LIBRARY
SUPREME COURT, U. S.

SUPREME COURT, U.S.
AUG 1 1970
E. ROBERT SEAVER, CLERK

# Supreme Court of the United States

October Term, 1970

No. 493

WALTER JOSEPH COLLINS,
*Petitioner,*

*—against—*

UNITED STATES

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ROBERT ALLEN SEDLER
3461 Keithshire Way
Lexington, Kentucky 40503

BENJAMIN E. SMITH
N. WILLIAM HODES
SMITH & SCHEUERMANN
305 Baronne Street
New Orleans, Louisiana 70112

*Attorneys for Petitioner*

## TABLE OF CONTENTS


PAGE

THE OPINION BELOW....1

JURISDICTION....2

QUESTIONS PRESENTED....2

CONSTITUTIONAL PROVISIONS INVOLVED....3

STATUTE AND REGULATIONS INVOLVED....3

STATEMENT OF THE CASE....4

REASONS FOR GRANTING THE WRIT....8

I. The holding of the Court of Appeals to the effect that the petitioner was barred from asserting the defenses of violation of procedural rights by the board and illegal composition of the board because of failure to exhaust administrative remedies is in conflict with the decision of this Court in *McKart v. United States*.... 8

II. The decision of the Court of Appeals for the Fifth Circuit to the effect that failure to appeal from a classification in 1-A bars a registrant from asserting as a defense to a prosecution for refusal to submit to induction a subsequent violation of the regulations by the local board, which prevented him from exercising his rights

relative to classification, is inconsistent with the decisions of other Courts of Appeal that have passed on the question and with its own decision in a prior case..... 11

III. This Court should grant certiorari to decide the important question of whether the failure of a registrant to appeal from his classification bars assertion of the defense that the local board was improperly constituted with respect to the residency of its members and/or because Negroes have been systematically excluded from membership..... 14

IV. The policy of petitioner's local board in refusing to consider claims for conscientious objector status filed after an order to report for induction has been issued and the statement of that policy by the clerk to the petitioner, as a result of which he failed to file such a claim, constitutes an egregious violation of the regulations, which has, in effect, been sanctioned by the Court of Appeals in refusing to invalidate the order of induction on this ground. In so doing the Court of Appeals has so far departed from the accepted course of judicial proceedings as to call for an exercise of this Court's power of supervision..... 16

V. The present case is a particularly appropriate one for the Court to consider the effect of the non-residency of the members of the local board upon the validity of an order to report for induction, since it raises both the question of residency within the county and residency with-

in the area of jurisdiction of the local board..... 18

VI. This Court should grant certiorari to resolve the question left unanswered by its affirmance of *DuVernay v. United States* by an equally divided Court, of whether systematic exclusion of Negroes from membership on draft boards violates the rights of Negro registrants..... 26

**CONCLUSION**.....30

**APPENDIX**.....1a
A – Opinion of the Court Below.....1a
B – Judgment of the Court Below.....7a
C – Order of the Court Below Denying Petition for Rehearing.....8a
D – Order Extending Time to File Petition for Writ of Certiorari.....9a
E – Pertinent Text of Statute Involved.....10a
F – Pertinent Text of Regulations Involved.....14a
G – Relevant Motions and Orders in the District Court19a
H – Excerpts from Transcript of Proceedings on Defendant's Motion to Dismiss the Indictment, Sept. 18, 1968.....40a
I – Excerpt from Transcript of Proceedings on Defendant's Motion to Dismiss the Indictment, March 19, 1969.....67a
J – Excerpt from Transcript of Proceedings at Trial, June 23, 1969.....71a

## CASES CITED.

Boswell v. United States, 390 F. 2d 181 (9th Cir., 1968) ....17
Calhoon v. Harvey, 379 U.S. 134 (1964) ....20
Clay v. United States, 397 F. 2d 901 (9th Cir., 1968) remanded on other grounds *sub nom.* Giordano v. United States, 394 U.S. 310 (1969) ....27, 29
Czepil v. Hershey, 425 F. 2d 251 (7th Cir., 1970) ....15, 21, 25
DuVernay v. United States, 394 F. 2d 979 (5th Cir., 1968) *aff'd.* by an equally divided Court, 394 U.S. 309 (1969) ....14, 15
Haven v. United States, 403 F. 2d 384 (9th Cir., 1968) *cert. dis.*, 393 U.S. 1114 (1969) ....15, 21
Jessen v. United States, 242 F. 2d 213 (10th Cir., 1957) ....20
McKart v. United States, 395 U.S. 185 (1969) ....8, 10, 11, 12, 14, 15, 16
Mulloy v. United States, ––U.S.––, 90 S. Ct. 1766 (1970) ....12, 23, 26
Oestereich v. Selective Service System Local Board, 393 U.S. 414 (1968) ....25
Petersen v. Clark, 289 F. Supp. 949 (N.D. Cal. 1968) ....17
Powers v. Powers, 400 F. 2d 438 (5th Cir., 1968) ....13, 17
Service v. Dulles, 354 U.S. 363 (1957) ....23
Strauder v. West Virginia, 100 U.S. 303 (1880) ....28
Striker v. Resor, 283 F. Supp. 923 (D.N.J. 1968) ....17
United States v. Beltran, 306 F. Supp. 385 (N.D. Cal. 1969) ....15, 21, 23
United States v. Brooks, 415 F. 2d 502 (6th Cir., 1969) ..15, 20
United States v. Chaudron, ––F.2d––, No. 19,759 8th Cir., Apr. 27, 1970, 2 *Sel. Serv. L. Rep.*, 3672 ....15, 21, 25
United States v. Clinton, ––F. Supp.––, Crim. No. 31, 857-C, E.D.La., Apr. 24, 1970 ....22

United States v. Dale, 304 F. Supp. 1278 (D.R.I. 1969) .....24
United States v. Davis, 413 F. 2d 148 (4th Cir., 1969)..13, 17
United States v. Lemke, 310 F. Supp. 1298 (N.D. Cal. 1969).....21
United States v. Machado, 306 F. Supp. 995 (N.D. Cal. 1969).....15, 21, 25
United States v. Nugent, 346 U.S. 1 (1953) .....22
United States v. Nussbaum, 306 F. Supp. 66 (N.D. Cal. 1969).....15, 20
United States v. Rink, 315 U.S. 203 (1942).....15
United States v. Seeley, 301 F. Supp. 811 (D.R.I. 1969) ...17
United States v. Shermeister, ––F. 2d––, No. 17,482, 7th Cir., Jan. 21, 1970, 2 *Sel. Serv. L. Rep.*, 3492.....17
United States v. Sobczak, 264 F. Supp. 752 (N.D.Ga. 1966).....17
United States v. Stafford, 389 F. 2d 215 (2d Cir., 1968) ....17
United States v. Stewart, 306 F. Supp. 29 (N.D.Cal. 1969) *app. dis.*, ––U.S.––, 90 S. Ct. 810 (1970).....11
United States v. Williams, 420 F. 2d 288 (10th Cir., 1970) .....9, 13, 17
United States Alkali Export Ass'n. v. United States 325 U.S. 196 (1945) .....10
Vitarelli v. Seaton, 359 U.S. 535 (1959) .....23, 26
Whitus v. Georgia, 385 U.S. 545 (1967).....29

## STATUTES CITED

28 U.S.C. section 1254 (1).....2
50 App. U.S.C. section 460(b)(3).....3, 18, 19, 22, 25
50 App. U.S.C. section 462.....1, 3

## REGULATIONS CITED

32 C.F.R. section 1600.735-1 ..... 3
32 C.F.R. section 1604.52 ..... 3
32 C.F.R. section 1604.52(b) ..... 25
32 C.F.R. section 1604.52 (c) ..... 18, 19, 20, 21, 22
32 C.F.R. section 1606.62 ..... 3, 9
32 C.F.R. section 1606.63 ..... 3, 9
32 C.F.R. section 1621.11 ..... 3
32 C.F.R. section 1622.1(c) ..... 3
32 C.F.R. section 1625.2 ..... 17

## OTHER AUTHORITIES CITED

Hearings: Amending and Extending the Draft Law and Related Authorities ..... 18, 19, 23
Report of the National Advisory Committee on Civil Disorders ..... 24
Report of the National Advisory Committee on Selective Service ..... 27

# Supreme Court of the United States

October Term, 1970

No.

WALTER JOSEPH COLLINS,

*Petitioner,*

*—against—*

UNITED STATES

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgement herein of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on April 27, 1970, petition for rehearing denied on June 12, 1970.

## OPINION BELOW

The opinion of the Court of Appeals is not yet reported and is printed as Appendix A hereto, p. 1a. It affirmed a judgement of conviction of petitioner for failing to submit to induction into the Armed Forces of the United States in violation of 50 App. U.S.C. section 462. The order of the District Court denying petitioner's motion to dismiss the indictment and setting forth the reasons for such action is printed in Appendix G hereto, pp. 19a-39a.

## JURISDICTION

The judgment of the United States Court of Appeals was entered on April 27, 1970, Appendix A, p. 1a, petition for rehearing denied on June 12, 1970, Appendix C, p. 8a. An order extending the time in which to petition for certiorari until August 1, 1970, was entered by this Court on July 10, 1970, Appendix D, p. 9a. The jurisdiction of this Court is invoked under 28 U.S.C. section 1254 (1).

## QUESTIONS PRESENTED

1. Does the failure of a registrant to take an administrative appeal from a classification of I-A preclude him, in a prosecution for refusal to submit to induction, from asserting that the order to report for induction was invalid on the grounds that: (1) the clerk and another official of the selective service local board advised him that the board would not consider a claim for conscientious objector status filed after an order to report for induction had been issued, as a result of which he did not make application for such status; (2) the selective service local board was improperly constituted with respect to the residence of its members; and (3) the selective service local board was improperly constituted, because Negroes have been systematically excluded from membership on the board or only tokenly included thereon?

2. Is it a defense to a prosecution for refusal to submit for induction that the clerk and another official of the selective service local board advised the registrant that the board would not consider a claim for conscientious objector status filed after an order to report for induction had been issued, as a result of which the registrant failed to file such claim, believing that it would be futile?

3. Is it a defense to a prosecution for refusal to submit for

induction that the selective service board issuing the order to report for induction was improperly constituted with respect to the residence of its members in that the chairman of the board was not a resident of the county in which the local board had jurisdiction and of the remaining five members only two resided in the area in which the local board had jurisdiction, although there were a large number of residents of that area who were qualified and willing to serve on the local board?

4. Is it a defense to a prosecution for refusal to submit for induction brought against a person of the Negro race that the selective service local board issuing the induction order was improperly constituted, because Negroes have been systematically excluded from membership on the board or only tokenly included thereon, notwithstanding that the area served by the local board is predominantly Negro in population?

## CONSTITUTIONAL PROVISIONS INVOLVED

### Amendment V

"No person shall * * * be deprived of life, liberty, or property, without due process of law * * *."

## STATUTE AND REGULATIONS INVOLVED

The statute involved is the Military Selective Service Act of 1967, 50 App. U.S.C. sections 451 et seq. The relevant provisions are 50 App. U.S.C. sections 460 (b) (3), 462 (a). Because these provisions are lengthy, their pertinent text is set forth as Appendix E, p. 10a. The regulations involved are Selective Service Regulations, 32 C.F.R. sections 1600.735-1, 1604.52, 1606.62, 1606.63, 1621.11 and 1622.1 (c).

also said that the induction notice superseded any other sort of application." (Appendix H, p. 42a). This request followed an interview held between petitioner and agents of the Federal Bureau of Investigation in November of 1967, relative to his failure to report for induction in October of that year. At such interview petitioner was advised by the agents that he should attempt to apply for conscientious objector status. (Appendix H, p. 43a). Petitioner also testified that on the 18th or 19th of September, 1967, he attempted to present a claim for classification as a conscientious objector to his board. At that time he was sent by the clerk to confer with another official of the board, whose name was not revealed to him. Petitioner was advised by that official that since he had received an order to report for induction on September 15, 1967, "He could not entertain any applications or new ideas concerning my case." (Appendix H, pp. 44a-45a). Petitioner testified that he did not complete the Form 150 because, "When they gave me the form I was told that this induction notice that I received on that same day superseded the conscientious objector form," and "If that was the case, I could see no reason for filing the CO Form." (Appendix H, p. 48a). The petitioner was examined by the government's attorney and by the Court relative to his attempt to file for conscientious objector status and the advice that he had received from the clerk. (Appendix H, pp. 54a-57a). No attempt was made by the government to contradict his testimony by calling the clerk as a witness or in any other way. The Court also questioned the petitioner as to the nature of his religious beliefs and seemed to be of the opinion that the board could not consider the conscientious objector claim in the face of an outstanding induction order. (Appendix H, pp. 40a-42a, 49a, and 50a).

After the petitioner had been ejected from the induction center on December 15, 1967, he contacted an attorney, who

Because these provisions are lengthy, their pertinent text is set forth as Appendix F, p. 14a.

## STATEMENT OF THE CASE

Petitioner was indicted in the United States District Court for the Eastern District of Louisiana on six counts of failing to report for or to submit to induction in the Armed Forces, in violation of 50 App. U.S.C. section 462 (a). After a trial by jury, he was convicted on five counts and sentenced to five years in prison on each count, the sentences to run concurrently. In addition he was fined the sum of $2,000.

On January 19, 1967, petitioner, who had previously been classified in class II-S, was classified I-A by his local board. He claimed to have filed a timely appeal of this classification, but the trial judge specifically found that this was not the case. (Record, vol. I, p. 101). On August 17, 1967, petitioner was sent an order to report for induction on September 15, 1967. Because of a misunderstanding as to petitioner's current address, he did not receive this notice in time, and the jury acquitted the petitioner on this count. On September 26, 1967, petitioner was sent an order to report for induction on October 25, 1967, but was not inducted on that day. On December 12, 1967, he was ordered to report for induction on December 15, 1967, and again was not inducted. Petitioner claimed that he did report on those days, but was ejected from the induction center because he carried anti-war literature. (Trial Transcript, pp. 96-122, 155-158).

The order to report for induction on December 15, 1967, was given to the petitioner in person when he contacted the clerk of the board on December 12, 1967 to request classification as a conscientious objector. (Appendix H. pp. 40a, 42a). The petitioner testified that the clerk "said that she was giving me the conscientious objector form, but she

wrote a letter to the State Director of Selective Service, asking that the petitioner be allowed to report and submit to induction. Petitioner was ordered to report for induction on January 11, 1968. He appeared on that date, but left before the process was completed. (Trial Transcript, pp. 85-87). Petitioner was mailed two other notices to report for induction, which he claimed not to have received. (Trial Transcript, pp. 87-89).

It is conceded that the petitioner failed to report for or submit to induction on at least one occasion, and the issues raised in the present Petition involve only the validity of the order to report for induction.

On June 18, 1968, petitioner was indicted on six counts of failing to report for and submit to induction. On July 15, 1968, petitioner filed a motion to dismiss the indictment on the grounds, *inter alia*, that Negroes had been systematically excluded from membership on petitioner's local board or only tokenly included, and that he was given no notice or inadequate notice of his rights, immunities, duties and liabilities by his local board. (Appendix G, pp. 19a-21a). The petitioner's attorney then issued a subpoena to the State Director of Selective Service, ordering him to appear at the hearing on the motion to dismiss and to bring with him "all records relating to all persons nominated by the Governors of the State of Louisiana to serve on Selective Service Boards in the State since 1940, and their designation by race, as well as all records showing who has served on such boards during that time and their designation by race." The government moved to quash the subpoena on the ground, *inter alia*, that the petitioner did not have standing to raise the constitutional question, "inasmuch as he did not exhaust the administrative remedies afforded him by the Selective Service System." (Appendix G, pp. 22a-23a). Following an evidentiary hearing, the motion to quash the subpoena was granted

on October 3, 1968, on the ground that the petitioner had failed to exhaust the administrative remedies afforded him by the Selective Service System, thereby precluding him from raising the issue. (Appendix G, pp. 24a-25a).

On February 19, 1969, petitioner filed an additional motion to dismiss on the ground that the local board was improperly constituted with respect to the residency of its members. (Appendix C, p. 26a). It was not disputed that the chairman of the board at all times pertinent, Mr. Forrest Lee Minnix, was a resident of St. Tammany Parish (county), Louisiana, whereas the board held jurisdiction only in Orleans Parish (county), Louisiana. (Appendix I, pp. 67a-69a). Mr. Minnix was removed from the board in January, 1969, after the present petitioner had been indicted. Petitioner also made an offer of proof to the effect that prior to May, 1967, the local board was composed of five members, only one of whom resided within the geographical area of the board's jurisdiction in Orleans Parish, and that after May, 1967, of the board's six members, only two resided within the above area. (Appendix G, pp. 38a-39a). In May, 1967, Louis G. Mason, Jr., was appointed to serve on the board, in his opinion the first Negro ever to have done so. (Appendix H, pp. 65a-66a). The population of the area of the board's jurisdiction is at least two-thirds Negro.

Following an evidentiary hearing on petitioner's motion to dismiss the indictment, the Court denied the motion on April 25, 1969, on the ground that petitioner had failed to exhaust his administrative remedies. It also found that the substantive contentions were without merit. (Appendix G, pp. 28a-37a).

The case was tried before a jury on June 23, 1969. The jury returned a verdict of guilty on five of the six counts, and sentence was imposed on July 9, 1969. The petitioner appealed his conviction to the United States Court of Appeals for the Fifth Circuit, which affirmed the judgment of the District Court.

## REASONS FOR GRANTING THE WRIT

### I

*The holding of the Court of Appeals to the effect that the petitioner was barred from asserting the defenses of violation of procedural rights by the board and illegal composition of the board because of failure to exhaust administrative remedies is in conflict with the decision of this Court in* McKart v. United States.

In *McKart v. United States*, 395 U.S. 185 (1969), this Court, observing that, "The use of the exhaustion doctrine in criminal cases can be exceedingly harsh," 395 U.S. at 197, held that a registrant's failure to appeal his classification did not bar a challenge to the *validity of that classification* on the ground that the registrant was entitled to exemption from military service as a sole surviving son. In the case at bar the petitioner is not seeking judicial review of his classification, but is challenging only the *validity of the order to report for induction*, contending that the board which issued that order was illegally constituted and that the order itself was issued in violation of the regulations. The Court below, relying on the fact that the petitioner had not appealed from his *classification*, mechanically applied the exhaustion doctrine to bar an attack on the *validity of the order to report for induction*. If the failure of a registrant to appeal his classification is not automatically a bar to judicial review of the validity of that classification in a prosecution for refusal to submit to induction, as *McKart* holds, it would seem to follow *a fortiori* that such failure to appeal would not automatically be a bar to judicial review of the validity of the order to report for induction. But that is what the Court below has held, and in so doing it has departed from the principles established by this Court in *McKart*.

None of his defenses asserted by the petitioner were such that they *could have been raised during the administrative process.* The defense relating to the refusal of the board to accept his post-induction claim for classification as a conscientious objector arose after the initial classification had been completed. To say, as the Court below did, that petitioner "never challenged his I-A classification," (Appendix A, p. 6a). ignores the fact that as a result of the refusal of the board to consider his conscientious objector claim, there was no way by which he could challenge the I-A classification at the time when his beliefs entitling him to a different classification had matured. As was observed in *United States v. Williams*, 420 F.2d 288, 291 (10th Cir., 1970), where, as here, the clerk advised the registrant that it would be fruitless to pursue his claim of conscientious objection, "The facts that would give rise to the exhaustion exemption here, likewise go to the contention that a lack of procedural fairness was afforded the appellant by the board."

Nor could the petitioner have challenged the composition of his local board by the administrative process. Apart from the fact that the petitioner was not aware of the illegal composition of the board with respect to residency until after the order to report for induction had been issued, the Selective Service System, far from correcting the illegal composition of the board, *would not even have furnished petitioner the information on which to base such a claim.* Under the applicable regulations selective service officials must refuse to divulge the addresses and "other personal data" of the board members even under court order to do so. 32 C.F.R. sections 1606.62, 1606.63. There was no way, therefore, that the petitioner could have found out the addresses of the board members or their race by pursuing administrative remedies, and certainly there was no administrative proceeding by which he could have challenged the

board's composition. One cannot be charged with failing to pursue administrative remedies that do not exist. *United States Alkali Export Ass'n v. United States*, 325 U.S. 196 (1945).

The real question presented here, as in *United States v. McKart, supra*, is one of *waiver*, not premature interruption of the administrative process, since by the time a criminal prosecution has been initiated, all administrative remedies are closed to the registrant. 395 U.S. at 196-7. The question here is whether the petitioner, by failing to take an appeal from a I-A classification, waived his rights to challenge the illegal composition of the local board and in some mysterious way the right to challenge a violation of the regulations with respect to the reopening of his classification occurring *after* the time to appeal from the prior I-A classification had expired. In *McKart* this Court refused to apply the principle of waiver and refused to hold that "petitioner's failure to utilize a particular administrative process — an appeal — bars him from defending a criminal prosecution on grounds which could have been raised on that appeal." 395 U.S. at 197. In the case at bar the petitioner is seeking to defend a criminal prosecution on grounds *which could not have been raised on any administrative appeal*. Moreover, unlike the registrant in *McKart*, the present petitioner did not attempt to by-pass the administrative system. He did all that he could to come within it and to make his claim for conscientious objector status, but was rebuffed by the failure of his board to follow the regulations and the misleading advice transmitted by the clerk as a result. Here it was the administrative process itself which foreclosed the petitioner from asserting the defenses in question and which caused him to suffer a deprivation of rights.

*McKart* also makes it very clear that there is to be no waiver of judicial review except where the issue as to which

review is sought involves factual determinations or classification questions requiring expertise or the exercise of discretion by local boards and appeal boards. 395 U.S. at 198. Since the question in *McKart* was one of statutory interpretation, there was "simply no overwhelming need for the court to have the agency finally resolve this question in the first instance, at least not where the administrative process is at an end and the registrant is faced with criminal prosecution." 395 U.S. at 199. In the case at bar we are not even dealing with a classification question, but solely with the validity of the induction order. The issues presented here are ones involving a question of law upon which the board has no particular expertise to which the Court should defer. See the discussion in *United States v. Stewart*, 306 F. Supp. 29, 33 (N.D.Cal. 1969), *app. dis.*, — U.S. —, 90 S.Ct. 810 (1970).

Under the principles enunciated by this Court in *McKart*, the exhaustion-waiver doctrine was clearly inapplicable to petitioner's case. Its application by the Court of Appeals, therefore, was in direct conflict with a decision of this Court, and for this reason, certiorari should be granted.

## II

*The decision of the Court of Appeals for the Fifth Circuit to the effect that failure to appeal from a classification in I-A bars a registrant from asserting as a defense to a prosecution for refusal to submit to induction a subsequent violation of the regulations by the local board, which prevented him from exercising his rights relative to classification, is inconsistent with the decisions of other Courts of Appeal that have passed on the question and with its own decision in a prior case.*

In its opinion the Court of Appeals stated that:

"The record here shows that there was ample basis in fact

> for Collins' 1-A classification. He never challenged that classification. Prior to report he never filed a conscientious objector form. After the notice to report there was no showing of a "change in circumstances justifying a reopening of the classification." (Appendix A, p. 6a).

It was on this basis that the Court distinguished *McKart*, saying that there the registrant was entitled to exemption as a matter of law, so that there was no basis in fact for his classification. But, as pointed out previously, the uncontradicted testimony of the petitioner showed that he was advised by the clerk of the board and another official that it would do him no good to file an application for conscientious objector status, since the board would not consider such application following issuance of an order to report for induction. (Appendix H, pp. 42a, 44a-45a). He testified that he did not file the Form 150[1] because he believed it would be futile to do so. (Appendix H, p. 48a). To hold that his failure to appeal from his 1-A classification, which had been given earlier, bars him from asserting a violation of rights resulting from the board's refusal to consider a post-induction claim for conscientious objector status and the misleading advice furnished by the local board is completely illogical. Apart from the time sequence, this defense does not involve the substantive classification, but the validity of the induction order as affected by the board's refusal to follow the regulations with respect to the reopening of a classification. *C.f. Mulloy v. United States*, — U.S. —, 90 S.Ct. 1766 (1970). No administrative remedy was available to deal with this violation of rights by the administrative agency itself.

To hold, as the Court of Appeals did in the case at bar,

---

[1] He, in fact, was given the form on December 12, 1967. At the same time he was also given the order to report for induction on December 15, 1967, and was told by the clerk that "The induction notice superseded any other sort of application." (Appendix H, p. 42a).

that a registrant who has not appealed from a substantive classification cannot challenge a violation of the regulations with respect to the board's refusal to consider a post-induction claim and the giving of misleading advice by the clerk is inconsistent with the decisions of all the other Courts of Appeal which have passed on the question. See e.g., *United States v. Williams*, 420 F.2d 288 (4th Cir., 1970); *United States v. Davis*, 413 F.2d 148 (14th Cir. 1969). It is also inconsistent with the decision of the Fifth Circuit itself in *Powers v. Powers*, 400 F.2d 438 (5th Cir. 1968).

In *Powers*, which involved misleading advice concerning the right to appeal, the District Court had denied relief on the ground that the appellant had failed to exhaust his administrative remedies. In reversing, the Court stated, "The registrant could not on the one hand be held to strict compliance with the requirement of, and the time allowed for, exhaustion of administrative remedies and at the same time be given instructions, information or advice by the board that the administrative remedy was not available or that pursuit of it was not necessary or should be delayed." 400 F.2d at 441. However, in the case at bar it held that the petitioner was barred because he had not exhausted his administrative remedies, observing that after the notice to report for induction had been issued, "There was no showing of a change in circumstances justifying reopening of the classification." (Appendix A, p. 6a). But the reason there was no showing was that the petitioner was advised that the board would not consider such evidence even if he submitted it. Like the registrant in *Powers*, he was advised that the administrative remedy--consideration of his claim for classification as a conscientious objector--was no longer available.

The holding of the Court of Appeals that the petitioner was barred on principles of waiver-exhaustion from asserting

the violation of the regulations by the local board in refusing to consider his post-induction claim of conscientious objection and the giving of misleading advice by the clerk is completely untenable. It is also inconsistent with the decisions of the other Courts of Appeal that have passed on the question and with its own decision in a prior case. For these reasons, certiorari should be granted to review that decision.

## III

*This Court should grant certiorari to decide the important question of whether the failure of a registrant to appeal from his classification bars assertion of the defense that the local board was improperly constituted with respect to the residency of its members and/or because Negroes have been systematically excluded from membership.*

Petitioner has contended that the rationale of this Court's decision in *McKart v. United States*, 395 U.S. 185 (1969), would hold inapplicable the exhaustion-waiver doctrine to a challenge that a local board was improperly constituted, since that challenge cannot even be raised in the administrative process, let alone the fact that the issue presented does not involve an exercise of administrative discretion or expertise. However, confusion exists in this area because of this Court's affirmance by an equally divided Court, 394 U.S. 309 (1969), of the Fifth Circuit's decision in *DuVernay v. United States*, 394 F.2d 979 (5th Cir., 1968). The basis of the Fifth Circuit's decision in *DuVernay* was that a challenge to the racial composition of the board could not be raised by a registrant who had failed to appeal from his I-A classification, and the decision in the case at bar was predicated on *DuVernay*. (Appendix A, p. 6a). Likewise, the Court of Appeals for the

Sixth Circuit has rendered an alternative holding to the effect that the failure to appeal bars an attack on illegal composition with respect to residency. *United States v. Brooks*, 415 F.2d 502 (6th Cir., 1969). At the other end of the spectrum, at least one court has considered the question on the merits, notwithstanding that the registrant had failed to appeal his I-A classification. *United States v. Beltran*, 306 F. Supp. 385 (N.D. Cal. 1969). Most courts, however, have passed on the merits without considering whether the registrant had appealed from his I-A classification. See e.g., *Haven v. United States*, 403 F.2d 384 (9th Cir., 1968), *cert. dis.*, 393 U.S. 1114 (1969); *United States v. Machado*, 306 F. Supp. 995 (N.D. Cal. 1969); *United States v. Nussbaum*, 306 F. Supp. 66 (N.D. Cal. 1969). [2]

The confusion in this area is compounded by this Court's affirmance of *DuVernay* by an equally-divided Court. *DuVernay* was argued together with *McKart*, and on the exhaustion-waiver question, the United States filed a single brief, covering its argument in both cases. Of course, the affirmance by an equally-divided Court does not constitute an authoritative precedent, *United States v. Pink*, 315 U.S. 203, 216 (1942) but the Fifth Circuit continues to treat its decision in *DuVernay* as correct on the question of exhaustion-waiver and as not having been affected by the decision of this Court in *McKart*.

The Court should grant certiorari in order to clarify the question, which has been confused as a result of its affirmance of *DuVernay* by an equally-divided Court on the heels of its decision in *McKart v. United States, supra*.

---

[2] The Seventh Circuit has dealt with the residency issue in the context of pre-induction judicial review. *Czepil v. Hershey*, 425 F.2d 251 (7th Cir., 1970). In a case arising in the Eighth Circuit, *United States v. Chaudron*, ––F.2d––, No. 19,759, 8th Cir., Apr. 27, 1970, 2 *Sel. Serv. L. Rep.* 3672, the registrant had in fact appealed from his I-A classification, although there was no discussion of this point in the opinion.

## IV

*The policy of petitioner's local board in refusing to consider claims for conscientious objector status filed after an order to report for induction has been issued and the statement of that policy by the clerk to the petitioner, as a result of which he failed to file such a claim, constitute an egregious violation of the regulations, which has, in effect, been sanctioned by the Court of Appeals in refusing to invalidate the order of induction on this ground. In so doing the Court of Appeals has so far departed from the accepted course of judicial proceedings as to call for an exercise of this Court's power of supervision*

In its opinion the Court of Appeals never discussed the contention of the petitioner that the order to report for induction was invalid because the board had effectively refused to accept his post-induction application for conscientious objector status. In holding that he was foreclosed by the exhaustion-waiver doctrine from asserting defenses going to the composition of the local board, the Court observed that, "After the notice to report there was no showing of a change of circumstances justifying a reopening of the classification." (Appendix A, p. 6a).[3] But the uncontradicted testimony of the petitioner showed that he was advised by the clerk of the local board and by another offical that it would do him no good to file an application for conscientious objector status at that time, since the board would not consider it. (Appendix H, pp. 42a, 44a-45a). He then testified that he did not file the Form 150 because he believed that it would be futile to do so. (Appendix H, p. 48a). The violation of the petitioner's rights resulted from the refusal of the

[3] It was on this basis that the Court distinguished *McKart v. United States, supra.*

board to consider the claimed classification and from the misleading advice which caused him to believe that making application for that classification would be futile. It is inconceivable why the Court of Appeals affirmed the conviction without considering that question specifically, both on its merits and with reference to the exhaustion-waiver doctrine.

Any classification *may* be reopened after an order to report for induction has been issued if the board finds that there has been a change in the registrant's status over which he has no control. 32 C.F.R. section 1625.2. It is well-settled, therefore, that the board must allow a registrant to file the Form 150 even after an induction order has been issued and must consider the Form in order to make a determination whether the classification should be reopened. *Boswell v. United States*, 390 F. 2d 181 (9th Cir., 1968); *United States v. Shermeister*, ———F.2d———, No. 17,482, 7th Cir., Jan. 21, 1970, 2 *Sel. Serv. L. Rep.* 3492; *United States v. Stafford*, 389 F.2d 215 (2d Cir., 1968). Likewise, it is well-settled that where the registrant is effectively prevented from exercising his right to claim a classification or to appeal due to erroneous advice from the clerk or other board official, there has been a denial of due process, invalidating the order to report for induction. *United States v. Williams*, 420 F.2d 288 (10th Cir., 1970); *United States v. Davis*, 413 F.2d 148 (4th Cir., 1969); *Powers v. Powers*, 400 F.2d 438 (5th Cir., 1968); *United States v. Seeley*, 301 F. Supp. 811 (D.R.I. 1969); *Striker v. Resor*, 283 F. Supp. 923 (D.N.J. 1968); *Petersen v. Clark*, 289 F. Supp. 949 (N.D. Cal. 1968); *United States v. Sobczak*, 264 F. Supp. 752 (N.D. Ga. 1966).

The holding of the Court of Appeals that the petitioner could not raise this defense because he did not appeal from a I-A classification rendered at an earlier time is, as pointed out previously, inconsistent with its own decision in *Powers v.*

*Powers, supra*. The refusal of the Court of Appeals in the case at bar to consider this defense on the merits is also completely inexplicable. Whatever its reason for so doing, it has so far departed from the accepted course of judicial proceedings as to call for an exercise of this Court's power of supervision.

## V

*The present case is a particularly appropriate one for the Court to consider the effect of the non-residency of members of the local board upon the validity of an order to report for induction, since it raises both the question of residency within the county and residency within the area of the jurisdiction of the local board.*

Under the Selective Service Act each member of the local board shall be a citizen of the United States residing in the county in which the local board has jurisdiction. 50 App. U.S.C. section 460 (b)(3). The regulations also provide that:

> "The members of the local boards shall be citizens of the United States who shall be residents of a county in which their local board has jurisdiction and who shall also, if at all practicable, be residents of the area in which their local board has jurisdiction." 32 C.F.R. Section 1604.52 (c).

The requirements for membership relate to the underlying theory of Selective Service classification that the registrant will be classified by "little groups of neighbors." As Senator Russell, the Chairman of the Senate Armed Services Committee, stated when this concept was retained in the 1967 Act despite the contrary recommendation of the National Advisory Committee on Selective Service:

> "The original proposal and objective was to keep the matter as close within the range of each of these boards . . . on the premise that they had information about family hardships, good faith, personal problems and conditions within homes that no computer yet devised could possibly ascertain, and that they would come as near to being fair as any group could be, knowing that they had to live in that community, with the mothers and fathers of the sons with whose lives they were dealing." Hearings: Amending and Extending the Draft Law and Related Authorities, p. 136 (1967 Government Publications Catalog, Item 9304).

These provisions are designed to insure that the selective service local board will be truly "local" in nature.

It is not disputed that the chairman of petitioner's local board was not a resident of the parish (county) over which the board had jurisdiction, in clear violation of the provisions of 50 App. U.S.C. section 460 (b)(3), as well as the provisions of 32 C.F.R. section 1604.52 (c). (Appendix I, pp. 67a-68a). Petitioner also made an offer of proof to the effect that prior to May, 1967, the local board was composed of five members, only one of whom resided within the geographical area of the board's jurisdiction, and that after that time, the board was composed of six members, only two of whom resided within the above area, in violation of the provisions of 32 C.F.R. section 1604.52 (c). (Appendix G, pp. 38a-39a). Thus, the chairman of the board was not a resident of the county and a majority of the members were not residents of the geographical area of the board's jurisdiction.

This case, therefore, presents the Court with the opportunity to resolve all the dimensions of the issue of non-residency, to–wit: (1) are the provisions of 50 App. U.S.C. section 460 (b)(3) and 32 C.F.R. section 1604.52 (c) to the effect that

the board members must reside within the county mandatory or directory; (2) are the provisions of 32 C.F.R. section 1604.52 (c) to the effect that the board members must reside within the geographical area of the board's jurisdiction mandatory or directory; (3) does the improper composition of the board with respect to residency render unlawful any order to report for induction issued by the board, so that such improper composition may be asserted as a defense to a criminal prosecution for refusal to submit to induction; (4) if improper composition of the board with respect to residency of its members renders unlawful any order to report for induction, it is sufficient if one member does not meet the requirements, or must a majority of the board members fail to meet the residency requirements.

Judging by the frequency with which the question has been presented to the courts, it would appear that the requirements of residency have been ignored in the case of many boards. The decisions of the federal courts passing on the question have gone off in many directions, making it all the more important that this Court definitively resolve it. *Calhoon v. Harvey*, 379 U.S. 134, 137 (1964).

One view is that even though the board may be improperly constituted with respect to the residency of some of its members, it is a *de facto* board whose action is not subject to collateral attack in a criminal prosecution. *United States v. Brooks*, 415 F.2d 502 (6th Cir., 1969) (alternative holding);[4] *Jessen v. United States*, 242 F.2d 213 (10th Cir., 1957); *United States v. Nussbaum*, 306 F. Supp. 66 (N.D. Cal. 1969).[5] Another view is that the provisions of the statute

[4]As stated previously, that Court also held that the registrant's failure to appeal from his I-A classification precluded the attack on the composition of the board.

[5]In *Jessen*, as in the case at bar, the Chairman was a non-resident of the county. In *Brooks* and *Nussbaum* the challenge was as to non-residency within the area.

and regulation requiring county residency are mandatory, but those of the regulation requiring residency within the geographical area are discretionary, so that if all of the board members are residents of the county, the board is a *de facto* board, and the qualifications of its members are not subject to attack in a collateral proceeding. *Czepil v. Hershey*, 425 F.2d 251 (7th Cir., 1970); *United States v. Chaudron*, ---F.2d---, No. 19,759, 7th Cir., Apr. 27, 1970, 2 *Sel. Serv. L. Rep.* 3672. It is not clear how these courts would treat the matter of county residency, although the Court in *Czepil* referred to that requirement as "jurisdictional."

The third view is that the provisions of 32 C.F.R. section 1604.52 (c) are mandatory both with respect to county and area residency and that an order to report for induction issued by a board improperly constituted with respect to the residency of its members is invalid. *United States v. Machado*, 306 F. Supp. 995 (N.D. Cal. 1969); *United States v. Beltran*, 306 F. Supp. 385 (N.D. Cal. 1969); *United States v. Lemke*, 310 F. Supp. 1298 (N.D. Cal. 1969). In all of these cases the challenge went to area residency rather than county residency, and in *Machado* and *Beltran* a majority of the members lived outside of the area. In *Haven v. United States*, 403 F.2d 384, the Court, while rejecting a challenge going to the exclusion of Jehovah's Witnesses from the board, referred to the provisions of the statute and 32 C.F.R. section 1604.52 (c), and observed that, "If the local board members have been appointed by the President upon the recommendation of the Governor and *each member meets the requirements of the law and regulations*, no further attack upon the composition of the board may be entertained." 403 F.2d at 386-7 (emphasis added). A recent and as yet unreported decision of the United States District Court for the Eastern District of Louisiana, the same Court in which the present petitioner was tried, also held that the require-

ment of area residency was mandatory, and since three out of the five members did not live within the area, the order to report for induction was held invalid. *United States v. Clinton*, ---F. Supp. ---, Crim. No. 31, 857-C, E.D. La., April 24, 1970. A final view, expressed in *United States v. Fisher* 307 F. Supp. 7 (D. Conn. 1969), is that where the member whose qualifications were challenged was not necessary to constitute a quorum, the registrant was not prejudiced by the failure to comply with the requirement of area residency. In view of the frequency with which this challenge is being made and in view of the fact that it is not disputed in these cases that the challenged members did not satisfy the residency requirements, it is imperative that this Court resolve the question.

It is the submission of the petitioner that the composition of the board goes to the matter of its *jurisdiction*, and that a board improperly constituted with respect to the residence of its members lacks jurisdiction to issue a lawful order to report for induction. The question is not one of "direct" or "collateral" attack, but of the power of the board to act at all. In this connection a board that is improperly constituted may be analogized to a court which lacks subject matter jurisdiction. Since the underlying theory of the Selective Service law is that a registrant is to be classified by "little groups of neighbors," *United States v. Nugent*, 346 U.S. 1, 8 (1953)--which theory is implemented by the provisions of 50 App. U.S.C. section 460 (b)(3) and 32 C.F.R. section 1604.52 (c)--an improperly constituted board cannot serve the function for which local boards have been established. Analogies to the *de facto* officer and a malapportioned legislature are completely inapposite in view of the fact that an improperly constituted board, unlike the *de facto* officer or the malapportioned legislature, cannot to what it is supposed to do. It cannot classify registrants based on the

personal knowledge of the members that is deemed to follow from their residing in the area served by the board. The board members likewise will not be accountable for their decisions to the people of the community in which they reside. See the remarks of Senator Stennis, *supra*, Hearings at pp. 142-143. Thus, the residency requirement does not go merely to the qualifications of the individual board member or to the process by which board members are selected——as do the *de facto* officer doctrine and the principle of validity to the acts of a malapportioned legislature——but to the essence of the Selective Service System and the power of local boards to classify registrants and order them for induction.

Because the provisions of the statute and regulation relate to the ability of the board to serve the function for which it was established, they should be construed as mandatory. Failure to follow a mandatory regulation on the part of an administrative agency is itself a denial of due process of law. *Vitarelli v. Seaton*, 359 U.S. 535 (1959). See also *Service v. Dulles* 354 U.S. 363 (1957). It is submitted, therefore, that an order to report for induction issued by a board that has been constituted in violation of the statute and regulation relating to residency is invalid, and a conviction based on the refusal to obey such an order cannot stand. *Cf. Mulloy v. United States*, ———U.S. ——, 90 S.Ct. 1766 (1970).

The same reasoning should make it clear that an individual registrant should not have to specifically show that he was prejudiced by the improper composition of the board. As was observed in *United States v. Beltran, supra* : "A violation of a regulation whose purpose is germane to insuring the accuracy of the decisional process should be considered prejudicial. While it is true that one cannot know whether a registrant's classification would have been different had the board been properly constituted, it is also true that the registrant's classification might have been different." 306 F. Supp. at

388. In the case at bar, for example, a differently constituted board might have realized that it had the responsibility to consider post-induction claims for conscientious objector classification. If so, it would have instructed the clerk to accept such claims and the petitioner would not have been told that it would do him no good to file one. Moreover, as another Court has stated in a different context:

> "There is no evidence that the defendant's classification was in any manner based upon prejudice . . . .In this situation . . .the absence of evidence of prejudice does not outweigh the obvious intent of the regulation and the seriousness with which it was undoubtedly drafted . . ." *United States v. Dale*, 304 F. Supp. 1278, 1282 (D.R.I. 1969).

The obvious intent of the statute and regulation was that the board members should be residents of the county and area served by the board so as to carry out the underlying "neighbors" concept on which classification was to be based. Therefore, a showing of specific prejudice——although it may be present in the case at bar——should not be required.

An added dimension to the residency requirement is presented in the case at bar, since the area served by the petitioner's local board is at least two-thirds Negro in population. The failure to comply with the statute and regulation has meant in practical effect that whites who do not reside in the area classify Negroes who do. Recognizing, as we unfortunately must, that this nation is headed in the direction of two societies, "separate and unequal," Report of the National Advisory Commission on Civil Disorders, p. 1 (1967), a strong argument can be made that the "little groups of neighbors" who will be classifying Negro registrants should be, at least in part, other Negroes. This argument will be developed more fully in the context of systematic exclusion of Negroes from membership on petitioner's local board. It is

sufficient to observe at this point that the failure to comply with the regulation in the case of petitioner's board resulted in an all-white board (until May, 1967, when one Negro was added) serving an area that is predominantly Negro in population.

Even the government appears willing to concede that the provisions of the statute requiring board members to be residents of the county served by the board, 50 App. U.S.C. section 460 (b)(3), are mandatory in nature. *United States v. Machado*, *supra*, 306 F. Supp. at 997. Two Courts of Appeal have recently indicated the same view. *Czepil v. Hershey*, *supra*; *United States v. Chaudron*, *supra*. In the case at bar the *chairman* of the petitioner's board was not a resident of the county, and this alone should render the board improperly constituted. No possible justification could be given for the failure to comply with this requirement.[6] A board whose chairman is not even a resident of the county served by the board is "infected with an alien presence" and is not the kind of board that the President was directed to establish under section 460 (b)(3). A board constituted in violation of the statute providing for the establishment of local board should be deemed a "lawless" board without the power to issue valid orders to report for induction. *Cf. Oestereich v. Selective Service System Local Board*, 393 U.S. 236, 237 (1968).

However, it is submitted that the requirement of residency within the area of the board's jurisdiction should be held mandatory as well. This requirement is equally necessary to implement the underlying theory of selective service classification. It is inconceivable that in a large area served by a local board, such as that in which the present petitioner resides, it is not practicable to find persons who are qualified and

[6] In the case of small counties, the statute makes provision for intercounty local boards. 50 App. U.S.C. section 460 (b)(3). See also 32 C.F.R. section 1604.52 (b).

willing to serve on local boards. *United States v. Machado*, *supra*, 306 F. Supp. at 997. There can be no reason except callous indifference why a local board should not be constituted in accordance with the regulations, and a violation of the regulations with respect to the composition of the board should render the induction order invalid in the same manner as a violation of the regulations by the board itself. *Mulloy v. United States*, *supra*.

The government is demanding that young men comply with the Selective Service law and threatens them with imprisonment if they fail to do so. *But the government should follow the same law it purports to enforce, and the regulations that it itself has promulgated.* "An executive agency must be rigorously held to the standards by which it professes its action to be judged." *Vitarelli v. Seaton*, 359 U.S. 535, 546 (concurring opinion of Mr. Justice Frankfurter). Should this not be true of draft boards as well, boards which wield such ominous power over the lives of so many young men?

It is submitted that a local board that is not constituted in accordance with the applicable statute and regulations is a lawless board, having no jurisdiction to issue orders, the violation of which are punishable by five years' imprisonment. This Court should grant certiorari to resolve this important question of federal law, on which the lower courts are divided, and the present case raises the question in all of its aspects.

## VI

*This Court should grant certiorari to resolve the question left unanswered by its affirmance of* DuVernay v. United States *by an equally divided Court, of whether systematic*

*exclusion of Negroes from membership on draft boards violates the rights of Negro registrants.*

The area served by petitioner's local board is approximately two-thirds Negro in population. Prior to May, 1967, no Negro appears ever to have served on the board; at that time one Negro was finally appointed. Thus, in an area that is predominantly Negro, young men are classified and inducted by a board that for many years has been exclusively white and which now has its "token Negro." To say the least, the situation of virtual exclusion of Negroes from membership on local boards is not peculiar to petitioner's board. See Report of the National Advisory Commission on Selective Service, p. 19 (1967), and the discussion in *Clay v. United States*, 397 F.2d 901, 909-10 (5th Cir., 1968), remanded on other grounds *sub nom, Giordano v. United States*, 394 U.S. 310 (1969). Some improvement may have taken place since that time, but in the case of petitioner's board it was only to the extent of adding a "token Negro."

This is not supposed to matter. The Fifth Circuit, while deploring the exclusion of Negroes from membership on draft boards, held that such exclusion was not a defense to a Negro registrant being prosecuted for a refusal to submit to induction, since (1) classification for induction is not like a criminal prosecution, so that the analogy to systematic exclusion of Negroes from juries is inapplicable, and (2) a draft board from which Negroes have been excluded is comparable to a malapportioned legislature, the acts of which are valid *de facto*. *Clay v. United States, supra*. The fact remains that here, as in so many other areas, Negroes are excluded from participating in decisions that affect their lives and are expected, under the threat of imprisonment, to adhere to decisions made by whites. The only way that Negroes will ever be included on draft boards in numbers remotely proportionate to their representation among the

general population is if this Court holds that when Negroes have been systematically excluded from membership on local boards, a Negro registered with such a board may not be convicted for failure to obey the board's order to report for induction. *Cf. Strauder v. West Virginia*, 100 U.S. 303 (1880).

However, the matter of exclusion of Negroes from draft boards takes on an added dimension where, as here, the area served by the local board is predominantly Negro in population. Like it or not, we must recognize that we do have two societies, separate but unequal, and that the great majority of whites have little personal contact with Negroes and little understanding of life as it is lived by most Negroes today. Nor can we ignore the prejudice and hostility manifested toward Negroes as a group by many whites and the enforced separation of races that until fairly recently was required by law in certain parts of the nation, including the area of the petitioner's residence. This situation will necessarily have an effect upon the process by which Negro registrants are classified by local boards. Where there are no Negroes on the board--or only a token Negro--Negro registrants may not feel at ease in dealing with the board. Stereotypes of the Negro--as well as mutual suspicion and hostility--may influence the judgment of board members on crucial classification decisions. The belief, for example, that Negroes "won't stay with any job"--which is held by many whites--may cause rejection of requests for occupational or agricultural deferments. The failure to understand the nature of Negro family life may impair the ability of white board members to pass on requests for hardship deferments. Beliefs about "Negro character" may make it impossible for white board members to accept a Negro registrant claiming conscientious objector status as "sincere." The prejudice and racism that are a part of American society

today lead to the conclusion, it is submitted, that a Negro registrant may not be fairly classified when Negroes have been systematically excluded from membership on draft boards or only tokenly included thereon.

This is not to say that a Negro must sit on every draft board that may have occasion to classify a Negro registrant. This is not to say that every draft board must be racially proportioned, as was contended in *Clay v. United States*, *supra*. It is to say that it should be open to a Negro registrant——before he is convicted for refusal to submit to induction and sentenced to five years' imprisonment——to show that Negroes have been systematically excluded from mebership on his board where, in view of the racial composition of the area served by that board, it would be expected that in the absence of systematic exclusion, Negroes would have been appointed. *Cf. Whitus v. Georgia*, 385 U.S. 545 (1967). A clear situation is where, as here, the area served by the local board is predominantly Negro in population and no Negroes have been appointed to membership until May, 1967, when one "token" Negro was appointed.

If Negroes are expected to serve in the Armed Forces, the government should be expected to appoint Negroes to membership on the draft boards that make the decisions as to who shall serve. When there has been obvious systematic exclusion, as in the case at bar, such exclusion should constitute a defense to a prosecution for refusal to submit to induction.

This Court should grant certiorari to resolve this fundamental question, which relates to the legitimacy of a system by which young Negro men are asked to give up their lives for their country while members of their race are excluded from membership on the boards that make the selection of who shall live and who may die.

## CONCLUSION

For the reasons aforesaid, it is respectfully prayed that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

ROBERT ALLEN SEDLER
3461 Keithshire Way
Lexington, Kentucky 40503

BENJAMIN E. SMITH
N. WILLIAM HODES
SMITH & SCHEUERMANN
305 Baronne Street
New Orleans, Louisiana 70112

*Attorneys for Petitioner*

**APPENDIX A**
**Opinion of the United States Court of Appeals for the Fifth Circuit**

**IN THE**

# United States Court of Appeals

**FOR THE FIFTH CIRCUIT**

---

**No. 28334**

---

**UNITED STATES OF AMERICA,**
**Plaintiff-Appellee,**

**versus**

**WALTER JOSEPH COLLINS,**
**Defendant-Appellant.**

---

*Appeal from the United States District Court for the Eastern District of Louisiana*

---

(April 27, 1970)

---

Before COLEMAN, GOLDBERG, and MORGAN, Circuit Judges.

PER CURIAM: On June 18, 1968, the defendant Walter Joseph Collins was indicted on six counts of failing to report for and submit to induction, in violation of 50 Appendix, United States Code, §462. On the trial of the merits, the defendant was acquitted on Count I and was found guilty on Counts II through VI, inclusive. He was sentenced to the custody of the Attorney General for five (5) years on each count; to

run concurrently. He was additionally fined a total of $2,000. We affirm.

In January of 1963, Collins registered with Selective Service System, Local Board Number 156 in New Orleans, and after presenting evidence that he was pursuing a full-time course of studies, he was given a II-S student deferment classification. By continuing to supply his Board with evidence that he was a student, the defendant maintained his II-S classification until January of 1967. Thereafter, he failed to supply the information that he was a student. In accordance with Selective Service Regulation, 32 C.F.R. §1622.10, on January 19, 1967, Collins was classified 1-A.

The appellant was subsequently ordered for a physical examination to which he reported and passed. Thereafter, on August 17, 1967, he was sent an order to report for induction on September 15, 1967. He failed to report for induction as ordered, but on September 18, 1967, he personally appeared at his Local Board and told them that he had moved and did not receive his notice to report until after the date for reporting had passed. The Board accepted this explanation and subsequently ordered him to report on October 25, 1967. Again Collins failed to report for induction and offered his local board no explanation for his failure to report. On November 9, 1967, he was reported to the United States Attorney's Office as being a delinquent registrant. On December 12, 1967, he personally appeared at the office of Local Board 156 and requested a Selective Service Form 150, which is a form that must be filled out by those persons, claiming to be

conscientious objectors. Collins was supplied with this form, and was also personally given a new order to report for induction on December 15, 1967. Selective Service Form 150 was never returned by the registrant.

The registrant again failed to report for induction on December 15, 1967, but his local board subsequently received a letter dated December 15, 1967, from his attorney. The text of the letter read as follows:

"Selective Service System
Induction Center
Customs House Building
New Orleans, Louisiana

RE: U.S. v. Walter Joseph
Collins

Gentlemen:

Please be informed that we represent Walter Joseph Collins of 9130 Fig Street, New Orleans, Lousisana, Selective Service Number 16-156-44-259.

This man received an original induction notice for October 25, 1967. He appeared, offered himself for induction, and because he wore an anti-war button on his clothing and refused to remove it, he was denied induction and was escorted from the building by the guard.

U.S.A. v. WALTER JOSEPH COLLINS

On December 12, 1967 he was hand delivered another induction notice for induction December 15, 1967, and again he appeared on time and because he was in possession of Draft Resistors League literature and refused to surrender it to the guard, he was again denied induction and escorted from the building.

This is to inform you that Mr. Collins stands ready, willing and able to be inducted into the Armed Forces of the United States pursuant to any reasonable order of your service. He reserves the right to protest the war in any lawful fashion up to the point of his induction. Your activities and/or the activities of your guards have prevented him from being inducted. If you will inform us as to when you wish for him to appear again for induction, and assure us that he will not be subjected to harrassment by your guards and the F.B.I. so as to prevent him from being inducted, we will guarantee his appearance and his willingness to take the oath."

The defendant was given the benefit of the doubt and was re-ordered to report for induction on January 11, 1968.

Special arrangements were made for Mr. Raymond Maloney, the Local Board Coordinator, to personally escort Mr. Collins into the induction station. Mr. Maloney kept his appointment and saw to it that the de-

fendant was personally escorted through the induction process. Despite this personal attention, the defendant, nevertheless, eloped from the induction station and declined to submit to induction. Then "... in the interest of giving the registrant every possible benefit of the doubt ...", the defendant was sent two additional notices to report for induction on February 21, 1968 and March 18, 1968. He did not report.

It was later ascertained that when the defendant eloped from the induction station on January 11, 1968, he went to Canada and then to New York, where he was subsequently arrested.

Collins at no time attempted to exercise any administrative challenge to his classification or his order to report for induction.

He moved to dismiss the indictment because "Negroes have been systematically and totally excluded from the defendant's Local Draft Board, or only tokenly included thereon; the Board was illegally constituted in that one member had moved out of its jurisdiction; counsel had not been allowed him" in any encounter with his local board; had not been given notice of his rights, immunities, duties, and liabilities by his Local Board; had not been warned of the consequences of his acts; and had not been given a fair hearing in his encounters with the Board. The motion was denied.

In his brief on appeal, Mr. Collins states:

U.S.A. v. WALTER JOSEPH COLLINS

"For the purposes of this appeal, it is conceded that petitioner (sic) failed to report for or submit to induction on at least one occasion, and the only issues raised here involve the legality of the classification and induction orders."

A reiteration of the many decisions in this Circuit dealing with the subject matter of this appeal could serve no further precedential purpose.

We conclude that the conviction is due to be affirmed under the authority of *Clay v. United States*, 5 Cir., 1968, 397 F.2d 901 and *DuVernay v. United States*, 5 Cir., 1968, 394 F.2d 979, affirmed by an equally divided Court, 394 U.S. 309, 89 S.Ct. 1186, 22 L.Ed.2d 306 (1969).

Nor do we understand that a different result is required by *McKart v. United States*, 395 U.S. 185, 89 S.Ct. 1157, 23 L.Ed.2d 194 (1969). In *McKart*, the registrant was entitled to exemption as a matter of law, hence there was no basis in fact for his classification. The record here shows that there was ample basis in fact for Collins' 1-A classification. He never challenged that classification. Prior to a notice to report he never filed a conscientious objector form. After the notice to report there was no showing of a change in circumstances justifying a reopening of the classification.

Therefore, the judgment of the District Court is

AFFIRMED.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

## APPENDIX B
## Judgment of the United States Court of Appeals for the Fifth Circuit

# United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1969

No. 28334

D. C. Docket No. Cr. 31299 D

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WALTER JOSEPH COLLINS,

Defendant-Appellant.

*Appeal from the United States District Court for the*
Eastern District of Louisiana
Before COLEMAN, GOLDBERG, and MORGAN, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was arguod by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

April 27, 1970

Issued As Mandate:

THE

# United States Court of Appeals

## FOR THE FIFTH CIRCUIT

---

**No. 28334**

---

**UNITED STATES OF AMERICA,**
**Plaintiff-Appellee,**

**versus**

**WALTER JOSEPH COLLINS,**
**Defendant-Appellant.**

---

*Appeal from the United States District Court for the Eastern District of Louisiana*

---

*ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC*

---

(June 12, 1970)

---

Before COLEMAN, GOLDBERG, and MORGAN, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

## APPENDIX D
## Order of the Supreme Court of the United States Extending Time in Which to File Petition for Certiorari

### Supreme Court of the United States

*No.* ---------- , *October Term, 19* 70

WALTER JOSEPH COLLINS,

Petitioner,

v.

UNITED STATES

---

**ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI**

---

UPON CONSIDERATION of the application of ~~counsel for~~ petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including

August first , 1970.

/S/ Hugo L. Black
*Associate Justice of the Supreme Court of the United States*

Dated this 9th
day of July , 19 70.

## APPENDIX E

### Pertinent Text of Statute Involved

### Military Selective Service Act of 1967
### [50 App. U.S.C. Section 451 et seq.]

**50 App. U.S.C. Section 460 (b) (3) (partial)**

The President is authorized—

(3) to create and establish within the Selective Service System civilian local boards, civilian appeal boards, and such other civilian agencies, including agencies of appeal, as may be necessary to carry out its functions with respect to the registration, examination, classification, selection, assignment, delivery for induction, and maintenance of records of persons registered under this title [sections 451, 453, 454, 455, 456 and 458–471 of this Appendix], together with such other duties as may be assigned under this title [said sections]: *Provided,* That no person shall be disqualified from serving as a counselor to registrants, including service as Government appeal agent, because of his membership in a Reserve component of the Armed Forces. He shall create and establish one or more local boards in each county or political subdivision corresponding thereto of each State, Territory, and possession of the United States, and in the District of Columbia. Each local board shall consist of three or more members to be appointed by the President from recommendations made by the respective governors or comparable executive officials. No member shall serve on any local board or appeal board for more than twenty-five years, or after he has attained the age of seventy-five. No citizen shall be

denied membership on any local board or appeal board on account of sex. The requirements outlined in the preceding two sentences shall be fully implemented and effective not later than January 1, 1968: *Provided,* That an intercounty local board consisting of at least one member from each component county or corresponding subdivision may be established for an area not exceeding five counties or political subdivisions corresponding thereto within a State or comparable jurisdiction when the President determines, after considering the public interest involved and the recommendation of the governor or comparable executive official or officials, that the establishment of such local board area will result in a more efficient and economical operation. Any such intercounty local board shall have within its area the same power and jurisdiction as a local board has in its area. No member of any local board shall be a member of the armed forces of the United States, but each member of any local board shall be a civilian who is a citizen of the United States residing in the county or political subdivision corresponding thereto in which such local board has jurisdiction, and each intercounty local board shall have at least one member from each county or political subdivision corresponding thereto included within the intercounty local board area. Such local boards, or separate panels thereof each consisting of three or more members, shall, under rules and regulations prescribed by the President, have the power within the respective jurisdictions of such local boards to hear and determine, subject to the right of appeal to the appeal boards herein authorized, all questions or claims with respect to inclusion for, or exemption or deferment from training and service under this title [said sections], of all individuals within the jurisdiction of such local boards. The decisions of such local board shall be final, except where an appeal is authorized and is taken in accordance with such rules and regulations as the President may prescribe.

**50 App. U.S.C. Section 462 (a)**

Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said title, rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate regarding or bearing upon a classification or in support of any request for a particular classification, for service under the provisions of this title, or rules, regulations, or directions made pursuant thereto, or who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title, or who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title, or any person or persons who shall knowingly hinder or interfere or attempt to do so in any way, by force or violence or otherwise, with the administration of this title or the rules or regulations made pursuant thereto, or who conspires to commit any one or more of such offenses, shall, upon conviction in any district court of the United States of

competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000 or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by court martial in any case arising under this title unless such person has been actually inducted for the training and service prescribed under this title or unless he is subject to trial by court martial under laws in force prior to the enactment of this title. Precedence shall be given by courts to the trial of cases arising under this title, and such cases shall be advanced on the docket for immediate hearing, and an appeal from the decision or decree of any United States district court or United States court of appeals shall take precedence over all other cases pending before the court to which the case has been referred.

## APPENDIX F

### Pertinent Text of Regulations Involved

### Selective Service Regulations
### [32 C.F.R. Ch. XVI]

**1600.735-1 Conduct Requirements in General.**–(a) The maintenance of unusually high standards of honesty, integrity, impartiality, and conduct by Government employees and special Government employees is essential to assure the proper performance of the Government business and the maintenance of confidence by citizens in their Government.

(b) Employees of the Selective Service System shall conduct themselves in such a manner that the work of the System is effectively accomplished; shall be courteous, considerate, and prompt in dealing with or serving the public; and shall conduct themselves in both their official and personal lives in a manner that will not bring discredit or embarrassment to the Selective Service System.

(c) Employees shall observe the applicable law and regulations governing participation in political activities; avoid any discrimination because of race, color, religion, national origin, or sex; economically utilize, protect, and conserve Federal property entrusted to them; and conduct all their official activities in a manner which is above reproach and free from any indiscretions or acceptance of gratuities or favors which would cast doubt or suspicion upon themselves or the administration of the Selective Service System.

**1604.52 Composition and Appointment.**–(a) A local board of three or more members shall be appointed for each local board area by the President upon recommendation of the Governor.

(b) A local board of three or more members, with at least

one member from each county included within the intercounty local board area, shall be appointed for each intercounty local board area by the President upon recommendation of the Governor.

(c) The members of local boards shall be citizens of the United States who shall be residents of a county in which their local board has jurisdiction and who shall also, if at all practicable, be residents of the area in which their local board has jurisdiction. No member of a local board shall be a member of the armed forces or any reserve component thereof. Members of local boards shall be at least 30 years of age.

(d) No member shall serve on any local board for more than twenty-five years, or after he has attained the age of seventy-five years.

**1606.62 Requests for names, addresses, and personal data concerning board members, government appeal agents, advisors, and other officials.**—(a) In accordance with Federal Personnel Manual Letter 294-1, March 17, 1966, issued by the Civil Service Commission, the names, position titles, grades, salaries, and duty stations of employees of the Selective Service System are public information.

(b) The names of board members, government appeal agents and advisors will be posted in an area available to the public at each board office to which such personnel are assigned.

(c) In accordance with the reasoning of Federal Personnel Manual Letter 711-8, August 2, 1967, issued by the Civil Service Commission, the home addresses and other personal data concerning the officials designated in paragraph (b) of this section will not be released unless (1) the person to whom the data relates consents to such release or (2) the board chairman determines in writing after consultation with the

person to whom the data relates, that disclosure would not harm such person, and would not constitute a clearly unwarranted invasion of his personal privacy.".

[36 F.R. 7] Demands of courts or other authorities for records or information protected by these regulations.—(a) Authority to release records or information the disclosure of which is prohibited or restricted by the regulations in this part, including personal information bearing on the qualifications of an official to serve in the position he occupies, is reserved to the Director of Selective Service. A request, demand, or order to produce such information (hereafter "demand") will not be honored by any employee of the System without prior approval of the Director.

(b) Whenever such demand is made upon an employee of the System by or through a court or other authority, he will immediately notify the Director of Selective Service and the U.S. attorney for the district in which the issuing court or other authority is located.

(c) If response to the demand is required before instructions from the Director of Selective Service are received, the employee responsible for responding shall request the U.S. attorney to represent him, shall appear before the court or other authority, shall cause the court or other authority to be furnished a copy of this section and Section 1600.62, and shall cause it to be informed that the demand has been or is being, as the case may be, referred for the prompt consideration of the Director of Selective Service. The employee or his representative should respectfully request the court or other authority to stay the demand pending receipt of instructions from the Director of Selective Service.

(d) If the court or other authority declines to stay the effect of the demand, or rules that the demand must be complied with regardless of the instructions from the Director of Selective Service, the employee will respectfully

decline to comply with the demand (*United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 71 S. Ct. 416).

**1621.11 Special Form for Conscientious Objector.**—A registrant who claims to be a conscientious objector shall offer information in substantiation of his claim on a Special Form for Conscientious Objector (SSS Form 150) which, when filed, shall become a part of his Classification Questionnaire (SSS Form 100). The local board, upon request, shall furnish to any person claiming to be a conscientious objector a copy of such Special Form for Conscientious Objector (SSS Form 150).

**1622.1 General Principles of Classification.**—(a) (1) Primary liability for military training and service provided by the selective service law is placed on those persons in the following categories who are between the ages of 18 years and 6 months and 26 years:

(i) Every male citizen of the United States;

(ii) Every male alien admitted to the United States for permanent residence; and

(iii) Every male alien who has remained in the United States in a status other than that of a permanent resident for a period or periods totaling one year.

(2) Persons who on June 19, 1951, or thereafter were deferred under the provisions of section 6 (c) (2) (A) of the Act that were in effect prior to September 3, 1963, remain liable for training and service until they attain age 28.

(3) Persons whose liability for training and service is extended by the Act to age 35 are:—

(i) persons in a medical, dental or allied specialist category, and

(ii) persons who on June 19, 1951, were, or thereafter are deferred under any other provisions of section 6 of the Act.

(b) Classification is the key to selection and it must be accomplished in the spirit of the Military Selective Service Act of 1967, in which the Congress has declared "that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy."

(c) It is the local board's responsibility to decide, subject to appeal, the class in which each registrant shall be placed. Each registrant will be considered as available for military service until his eligibility for deferment or exemption from military service is clearly established to the satisfaction of the local board. The local board will receive and consider all information, pertinent to the classification of a registrant, presented to it. The mailing by the local board of a Classification Questionnaire (SSS Form 100) to the latest address furnished by a registrant shall be notice to the registrant that unless information is presented to the local board, within the time specified for the return of the questionnaire, which will justify his deferment or exemption from military service the registrant will be classified in Class I-A.

(d) In classifying a registrant there shall be no discrimination for or against him because of his race, creed, or color, or because of his membership or activity in any labor, political, religious or other organization. Each such registrant shall receive equal justice.

(e) Notwithstanding any other provision of law, any registrant who has failed or refused to report for induction shall continue to remain liable for induction, and when available shall be immediately inducted.

## APPENDIX G

### Relevant Motions and Orders in the District Court

[Motion to Dismiss Indictment]

In the UNITED STATES DISTRICT COURT
For the EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

UNITED STATES OF AMERICA NO. 31299 - F

vs.

WALTER JOSEPH COLLINS

### MOTION TO DISMISS INDICTMENT

The defendant moves that the indictment be dismissed on the following grounds:

I

Defendant, a negro, was denied due process of law and equal protection of the laws as guaranteed by the 5th and 14th Amendments to the United States Constitution, respectively, in that negroes have been systematically and totally excluded from defendant's Local Draft Board, or only tokenly included thereon. Defendant, because he is a negro, did not, and cannot, receive just and impartial consideration of his application for deferment by a Board so constituted; by violating defendant's 5th and 14th Amendment rights (and by violating Sections 1600 and 1604 of the Selective Service

Regulations), the Local Board relinquished and lost all jurisdiction over defendant.

Furthermore, the orders to report for induction issued by defendant's Local Board, since that Board was illegally constituted, were void.

II

Defendant was denied due process of law and right to counsel guaranteed by the 5th and 6th Amendments to the United States Constitution, respectively, in that counsel was not allowed him in any encounter with his Local Board or Appeal Board.

III

Defendant was denied due process of law, in that he was denied a fair hearing in every encounter with his Local Board and Appeal Board. In addition, such denial was in violation of Pa ts 1600, 1624, and 1626 of the Selective Service Regulations.

IV

Defendant was denied due process of law in that he was given no notice, or inadequate notice, of his rights, immunities, duties, and liabilities by his Local Board; nor at any time was defendant given notice of or warned of the consequences of his acts by either the Local Board or by Induction Center officials.

The aforegoing instances of denial of basic constitutional safeguards removed defendant from the Local Board's jurisdiction, and rendered invalid the induction orders which the indictment charges defendant with having violated.

WHEREFORE, defendant respectfully moves that the indictment against him be dismissed.

Respectfully submitted,

Benjamin E. Smith
Smith, Scheuermann, & Jones
305 Barronne St.
New Orleans, La.
Counsel for Defendant

Government's Motion to Quash Subpoena

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

UNITED STATES OF AMERICA

CRIMINAL DOCKET
NO. 31299

versus

SECTION B

WALTER JOSEPH COLLINS

MOTION TO QUASH SUBPOENA

NOW INTO THIS HONORABLE COURT comes the United States of America, through the undersigned Assistant United States Attorney, and moves that the Court quash the subpoena hereinafter described for the following reasons; to wit:

1. On the date of September 16, 1968, the defendant in the above captioned case issued a subpoena to Major General Erbon Wise, the Director of Selective Service for the State of Louisiana, ordering him to appear in this Honorable Court on September 18, 1968, at 2 o'clock p.m., in order to testify. He was further ordered to bring with him "... all records relating to all persons nominated by the Governors of the State of Louisiana to serve on Selective Service Boards in the State since 1940, and their designation by race, as well as all records showing who has served on such boards during that time and their designation by race."

2. The matter in which the aforesaid witness has been subpoenaed is a Motion to Dismiss the Indictment filed by the defendant herein, because he claims that the Selective Service Board which classified him systematically excluded

Negroes and thus deprived him of due process and equal protection of the law as guaranteed by the United States Constitution.

3. The defendant does not have standing to raise the aforesaid constitutional question inasmuch as he did not exhaust the administrative remedies afforded him by the Selective Service System.

4. The accumulation of the information as sort by the defendant in his subpoena *duces tecum* would cause an undue burden and hardship upon the personnel of the Selective Service System for the State of Louisiana.

WHEREFORE, the Government prays that considering the burdensome nature of the subpoena issued by the defendant herein, together with the fact that the defendant does not have standing to contest the constitutional question to which the subpoena addresses itself, this Honorable Court quash the said subpoena and relieve the party subpoenaed from the necessity of appearing herein and producing the requested records.

Respectfully submitted,

LOUIS C. LaCOUR,
UNITED STATES ATTORNEY

JULIAN R. MURRAY, JR.
Assistant United States Attorney
500 St. Louis Street
New Orleans, Louisiana 70130
Telephone: 527-2921

[Order of Court Granting Motion to Quash Subpoena]

Minute Entry
October 1, 1968
Heebe, J.

THE UNITED STATES — CRIMINAL ACTION

versus — NO. 31299

WALTER JOSEPH COLLINS — SECTION B

This cause came on for hearing on a previous day on the motion of the government to quash a subpoena *duces tecum* issued to Major General Erbon Wise ordering him to bring "... all records relating to all persons nominated by the Governors of the State of Louisiana to serve on Selective Service Boards in the State since 1940, and their designation by race, as well as all records showing who has served on such boards during that time and their designation by race." The subpoena *duces tecum* was issued by the defendant in conjunction with a Motion to Dismiss the Indictment. In his motion to dismiss the defendant seeks to attack the constitutionality of the composition of his local board, alleging that the local board which classified him systematically excluded Negroes and this deprived him of due process and equal protection of the law as guaranteed by the United States Constitution.

Having considered the evidence, it is the finding of the Court that the defendant does not have standing to contest the constitutional question to which the subpoena addresses itself inasmuch as he did not exhaust the administrative remedies afforded him by the Selective Service System. *DuVernay v. United States*, 394 F.2d 979 (5th Cir. 1968).

Therefore, the Motion of the Government to Quash the Subpoena is hereby GRANTED.

Julian R. Murray, Esq..
Benjamin E. Smith, Esq.

[Supplemental and Additional Motion to Dismiss Indictment]

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF LOUISIANA**
**NEW ORLEANS DIVISION**

| | |
|---|---|
| UNITED STATES OF AMERICA | |
| versus | DOCKET NO. 31299<br>SECTION "B" |
| WALTER JOSEPH COLLINS | |

**SUPPLEMENTAL AND ADDITIONAL MOTION TO DISMISS**

AND NOW INTO COURT, through undersigned counsel, comes the defendant herein, who again moves that this matter be dismissed on the grounds that his Selective Service Board was unconstitutionally and illegally constituted in that the Chairman of the Board at all times pertinent herein was Forrest Lee Minix, who was illegally serving on said Board, since at all times herein he was and is a resident and domiciliary of St. Tammany Parish Louisiana, whereas defendant's Board holds jurisdiction only in Orleans Parish Louisiana, all of which is in violation of 50 App. USC, Section 460 *et seq.*, which requires as follows: "... but each member of any local board shall be a civilian who is a citizen of the United States residing in the county or political subdivision corresponding thereto in which such local board has jurisdiction, ..."

Defendant also moves that this indictment be dismissed on the grounds that his indictment order was null and void inasmuch as he was called out of order without those eligible

to go ahead of him in his classification being called and without the classifications in advance of his being exhausted, and that he was, therefore, called out of order.

Further and finally, defendant alleges on information and belief that he was classified and ordered for induction by an illegally constituted Board, all of which is in violation of law.

SMITH, SCHEUERMANN & JONES
Attorneys for Defendant
1006 Baronne Building
New Orleans, Louisiana, 70112
Phone: 525-4361

BY /S/ Benjamin E. Smith
BENJAMIN E. SMITH
Trial Attorney

[Order of Court Denying Motion to Dismiss Indictment]

Minute Entry
April 25, 1969
Judge J

THE UNITED STATES : CRIMINAL ACTION

VERSUS : NO. 31296

WALTER JOSEPH COLLINS : SECTION B

This cause came on for hearing on previous days on the following motions: (1) motion of defendant to dismiss the indictment (filed July 15, 1968); (2) motion of defendant to dismiss (filed October 17, 1968); and (3) supplemental and additional motion of defendant to dismiss (filed February 19, 1969). Having considered the evidence presented at the hearings, having heard the arguments of counsel and having studied the legal memoranda submitted by the government and the defendant, the Court is now advised in the premises and ready to rule.

IT IS THE ORDER OF THS COURT that the defendant's motions to dismiss be, and the same are, hereby, DENIED. Reasons to be assigned at a later date.

Louis C. LaCour, Esq.
Benjamin E. Smith, Esq.
Julius R. Murray, Jr., Esq.

Minute Entry
June 20, 1969
Heebe, J.

UNITED STATES OF AMERICA : CRIMINAL ACTION

versus : NO. 31299

WALTER JOSEPH COLLINS : SECTION B

On April 23, 1969, the defendant's motions to dismiss the indictment were denied with reasons to be assigned: The Court now assigns the following reasons.

**REASONS**

Defendant's original motion to dismiss the indictment (filed July 15, 1968) was set for hearing on September 18, 1968. At that hearing the government filed a motion to quash the subpoena duces tecum served on Major General Erbon Wise ordering him to produce ". . . all records relating to all persons nominated by the Governors of the State of Louisiana to serve on Selective Service Boards in the State since 1940, and their designation by race, as well as all records showing who has served on such boards during that time and their designation by race." The Court heard evidence on September 18, 1968, and on September 25, 1968, on the government's motion to quash and the matter was submitted. In our minute entry of October 1, 1968, we granted the government's motion to quash the subpoena duces tecum, stating:

> "Having considered the evidence, it is the finding of the Court that the defendant does not have standing to contest the constitutional question to which the sub-

poena addresses itself inasmuch as he did not exhaust the administrative remedies afforded him by the Selective Service System. *Duvernay v. United States*, 394 F. 2d 979 (5th Cir. 1968). Therefore, the Motion of the Government to Quash the Subpoena is hereby GRANTED."

Subsequently, defendant's motion to dismiss the indictment (filed July 15, 1968) and his motion to dismiss (filed October 17, 1968) were heard on November 21, 1968, and December 3, 1968. At the conclusion of the hearing, defendant requested two weeks to file a memorandum so that he would have the benefit of a transcript of the proceedings on the motion of the government to quash and on the motion of defendant to dismiss. The transcript was filed on February 13, 1969, and on the same day we ordered the defendant's memorandum to be filed by February 27, 1969. On February 19, 1969, the defendant filed another supplemental and additional motion to dismiss which was set for hearing on March 5, 1969. Counsel for the defendant was ill on March 5, 1969, so a status conference was set for March 7, 1969. As a result of the status conference, the hearing on the defendant's supplemental and additional motion to dismiss was set for March 19, 1969. The motion was taken under submission and the defendant was given until March 28, 1969, to furnish the Court with certain photostatic copies of evidence relating to the order of call of the defendant. As of April 25, 1969, when we rendered our decision on these motions to dismiss, we had never received the photostatic copies of such evidence. The evidence was finally received in May 1969; we will now consider that evidence in our discussion of these motions.

**I. Motion to dismiss the indictment (filed July 15, 1968).** A close examination of defendant's selective service file reveals

the following facts. On December 11, 1962, the defendant registered for Selective Service and on January 24, 1963, he was classified 1-A in accordance with standard Selective Service procedure. On January 23, 1964, after having supplied to Selective Service evidence indicating that he was presently enrolled in school, the defendant was classified 2-S (student deferment). On his questionnaire, he informed his local board that he expected to receive his college degree in June of 1966. The defendant continued to be classified 2-S by his local board until January 19, 1967, when he was classified 1-A. On April 28, 1967, he was ordered to report for a physical. He reported for this physical and was found qualified. He was ordered to report for induction on September 15, 1967, but failed to appear. That was the first of a series of failures to submit to induction which constitute the basis of the present indictment against him.

Defendant's original motion to dismiss was filed on July 15, 1968, and moved for dismissal based on five grounds.

Ground I. Defendant alleges that none of the members of his local draft board were Negroes, and since he, the defendant, is a Negro, he could not and did not receive just and impartial consideration when he was classified; all in violation of his rights under the Fifth and Fourteenth Amendments of the United States Constitution and Sections 1600 and 1604 of the Selective Service Regulations. In our minute entry of October 1, 1968, we found that the defendant had not exhausted the administrative remedies afforded him by the Selective Service System, and therefore did not have standing to contest the constitutionality of the composition of his local board. *DuVernay v. United States*, 394 F.2d 979 (5th Cir. 1968). That finding is dispositive of the first ground raised by defendant as well as all remaining grounds.

At this juncture, we emphasize that all of the grounds raised by the defendant in his various motions to dismiss go

to the legality of his classification and that matter is foreclosed by his failure to exhaust administrative remedies.

> "In summary, we hold that the arguments advanced by appellant go to the legality of his classification and that this matter is foreclosed by his failure to exhaust administrative remedies. Even if there can be exceptions to this general requirement, which we doubt, we find no basis for making an exception to it in this case." *DaVernay v. United States*, 394 F. 2d 979 at 983 (5th Cir. 1968).

Moreover, even considering defendant's motions on the merits, we still conclude that the record as a whole lends no support to his arguments as evidenced by the following discussion.

Ground II. The defendant alleges that he was unconstitutionally denied counsel in his "encounters" with his local and appeal boards. The evidence presented on the motion of the government to quash the subpoena *duces tecum* conclusively showed that the defendant never appeared before his local or appeal boards. Therefore, if by "encounter" the defendant means appearance before his local or appeal board, the question is moot because he never sought any such appearance. Even if he had appeared before his local board or appeal board and was denied counsel, that would in no way violate his constitutional rights. See, Selective Service Regulations, 32 C.F.R. 1624.1(b); *Cox v. United States*, 332 U.S. 442 (1947); *Niznik v. United States*, 173 F.2d 328 (6th Cir. 1949); and *United States v. Pitt*, 144 F.2d 169 (3rd Cir. 1944).

Ground III. Defendant contends that he was not afforded a fair hearing in his "encounters" with the Selective Service Board. There has been no credible evidence presented to establish that the defendant even tried to exhaust his

administrative remedies. Furthermore, from the evidence presented, it is the finding of the Court that the defendant never appeared before either his local board or his appeal board and at no time did he ever request that he be allowed to appear before either of these boards. Therefore, it is obvious that since the defendant did not request any hearings at all, he cannot complain that his right to a fair hearing was denied him.

Ground IV. Defendant further alleges that he was denied notice or given inadequate notice relative to his rights, duties and liabilities concerning Selective Service and that he was not given the mandatory warnings of the penalties for refusal to submit to induction as required by the cases of *Chernekoff v. United States*, 219 F.2d 721 (9th Cir. 1955) and *Parrott v. United States*, 370 F.2d 388 (9th Cir. 1966).

The evidence produced by the government on its motion to quash the subpoena *duces tecum* conclusively showed that the defendant was in fact given every notice required by law and the Selective Service Regulations.

The defendant's contention of not being advised of the mandatory warnings of the penalties for refusal to submit to induction is likewise totally without merit. The *Chernekoff* and *Parrott* cases are inapplicable to the case at bar because those cases dealt with Army Special Regulation No. 615-180-1 which requires that if an inductee refuses to take the step forward to be inducted, he must then be advised of the potential penalties for his action. In the instant case, defendant constantly refused to make himself available to be sworn in and therefore he could *not* be given the warnings. It was pointed out in the *Chernekoff* case that the physical presence of the defendant at the induction was a necessary prerequisite to the giving of the warnings. It is obvious that the defendant cannot fail to be present when he is supposed to be and then complain that he was not given a warning

when he was not there. It is not the *duty* of the government to "look him up" in order to warn him of the possible penalties for refusal to report for induction.

Ground V. Defendant alleges that the board acted arbitrarily and consequently lost jurisdiction over him. (Defendant didn't make this allegation in the motion itself, but he listed it in his supporting memorandum.) In support of this contention defendant cites *Niznik v. United States* 173 F.2d 328 (6th Cir. 1949); *Smith v. United States*, 157 F.2d 176 (4th Cir. 1946) and *Estep v. United States*, 327 U.S. 114 (1946).

In the *Niznik* case, the court found that the board had lost jurisdiction over the defendant because it was acting through prejudice and to this extent the board's conduct was lawless and arbitrary. From the evidence presented in this case, the government clearly established that the board in this case gave the defendant every consideration to which he was legally entitled and at no time was he ever treated prejudicially. The facts of the case at bar are totally different from the facts in the cases cited by the defendant. The defendant in the instant case never pursued—let alone exhausted—any of his administrative remedies. The record in this case is completely void of any evidence that would indicate the defendant's board treated him with the type of prejudice that was condemned in the *Niznik* case.

H. **Motion to dismiss (filed October 17, 1968).** In this supplemental motion to dismiss the defendant alleges that he presently has pending before the Selective Service Board an appeal upon which the board has not acted, and therefore the orders for induction which form the basis of this charge are *invalid and premature*. As support for this contention, defendant incorporated all of the testimony received on the government's motion to quash the subpoena *duces tecum* and all of the exhibits introduced at that hearing (especially D-4).

In the draft board record of the defendant, marked

englobo as G-1, there are two letters received from the defendant. The letters received by the draft board are D-1 and D-5. The defendant allegedly wrote in duplicate and mailed D-3 and D-4 which are not in his Selective Service file (G-1) and were never received by the local board. D-4 is the letter which defendant contends timely filed his appeal of the 1-A classification. From the evidence presented at the hearings, the Court finds that D-4 was never mailed and therefore never received by the defendant's board. It is inconceivable that the letter marked D-4 (plus an additional letter the defendant claims he wrote) could have failed to have reached his local board. There is no appeal presently pending before defendant's local board, and therefore his motion to dismiss is without merit.

III. **Supplemental and additional motion of defendant to dismiss (filed February 19, 1969).** This supplemental motion was based upon two grounds: (1) that the Selective Service Board which classified the defendant was unconstitutionally and illegally constituted in that the Chairman of the Board, Forrest Lee Minix, was illegally serving on said Board since he was, and is, a resident and domiciliary of St. Tammany Parish, Louisiana, whereas defendant's board holds jurisdiction only in Orleans Parish, Louisiana; and (2) that the defendant was called out of order without those eligible to go ahead of him in his classification being called and without the classifications in advance of his being exhausted.

The defendant's first ground is without merit. See *Jessen v. United States*, 242 F. 2d 213 (10th Cir. 1957).

> "It is apparently conceded that when the Chairman became a member of the Board, he lived within the City and County of Denver and within its territorial limits, and was therefore a *de jure* member of a *de jure* board.

> After he moved, he continued to exercise the duties of his office under color of title. He was therefore a *de facto* officer and his acts as such are valid so far as the public and third parties having an interest in them are concerned. And, 'neither his eligibility to appointment nor the validity of his official acts can be inquired into except in a proceedings brought for that purpose.' *United States ex rel. Doss v. Lindsley*, 7th Cir. 148 F.2d 22, 23, 158 A.L.R. 525; *Ex Parte Ward*, 173 U.S. 452, 19 S.Ct. 459, 43 L.Ed. 765; *Johnson v. Manhattan Ry. Co.*, 2d Cir., 61 F.2d 934. It follows that the local board was legally constituted; that it had jurisdiction over the person of the appellant when he registered; and that it did not lose it when one of the members moved from its territorial limits. In any event, we are certain that the appellant cannot attack the qualifications of its members in this proceedings." *Jessen v. United States*, *supra*, at 215.

In the instant case we find that Forrest Lee Minix, Chairman of the defendant's local board, was a resident of Orleans Parish in 1957 when he was appointed to the board and subsequently moved to St. Tammany Parish in 1959. Minix was appointed Chairman in 1964 and resigned some time in January of 1969. The facts of the instant case are clearly analogous to the *Jessen* case and that case is dispositive of the issues presently before this Court.

The defendant's second ground is likewise without merit. We reiterate that this ground, as well as all of the previous grounds, go to the legality of the defendant's classification and are foreclosed by his failure to exhaust administrative remedies. *DuVernay v. United States*, 394 F.2d 979 (5th Cir. 1968). After carefully studying the photostatic copies of the classification record, we find that several individuals who were in the same classification and category as the defendant

and were subject to call prior to the defendant (because of age) were not called for induction before the defendant. However, the record is completely void of any evidence that would show substantial prejudice to the defendant because of the order of call. Furthermore, the draft board may have good cause for not calling someone older than the defendant who is in the same category. Such information which is contained in the individual's Selective Service file is privileged and not subject to examination.

The defendant cites *United States v. Reckord*, 51 F.Supp. 507 (D.Md. 1943), as authority for the proposition that an improper order of cal vitiates an induction order. We do not find that the *Reckord* case is authority for that proposition. In *Reckord* the court held that in light of the particular facts before it, the action of the local board was legally arbitrary and capricious. We find no evidence in the record of the instant case that would indicate any arbitrary or capricious action on the part of the defendant's local board in classifying and calling him.

/S/ Frederick J. R. Heebe

Benjamin Smith, Esq.
Julian Murray, Esq.

[Defendant's Offer of Proof Relative to the Composition of Local Board 156]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | : | |
| | : | CRIMINAL ACTION |
| versus | : | NO. 31299 |
| | : | SECTION B (D) |
| WALTER JOSEPH COLLINS | : | |

**OFFER OF PROOF**

At the trial of the above-captioned matter, defendant Walter Joseph Collins offered to prove, and the Court refused to permit proof, of the following, to-wit:

1. Local Board 156 has jurisdiction in a definite geographical area in the City of New Orleans.

2. During the time when it was considering defendant's case, but before May, 1967, Local Board 156 was composed of five members.

3. Of these five members, only one resided within the definite area mentioned above.

4. After May, 1967, Local Board 156 was composed of six members.

5. Of these six members, only two resided within the area mentioned above.

6. There are, and have always been, a large number of residents of the area mentioned above, who are or were qualified and willing to serve on Local Board 156.

7. There are, and have always been, a sufficient number of residents of the area mentioned above, who are qualified and

willing to serve on Local Board 156, so that it would be *practicable* to have all members of Local Board 156 residents of the area in which their local board has jurisdiction.

SMITH & SCHEUERMANN
Attorneys for Defendant
1006 Baronne Building
New Orleans, Louisiana 70112
Phone: 525-4361

By /S/ Benjamin E. Smith
BENJAMIN E. SMITH

## ORDER

IT IS ORDERED that defendant Walter Joseph Collins be permitted to file the above Offer of Proof, and that it shall become a part of the Record in this case, as an Offer of Proof.

New Orleans, Louisiana this 25th day of July, 1969.

/s/ Edward J. Boyle Sr.
U.S. DISTRICT JUDGE

# APPENDIX H

Excerpts from Transcript of Proceedings on Defendant's Motion to Dismiss the Indictment, September 18, 1968 U.S. Dist. Ct., E.D.La., Hon. Frederick J.R. Heebe, U.S. District Judge, presiding

## Testimony of Walter Joseph Collins

(Record, Vol. II, pp. 33-42, 47-53, 83-91)

* * * * *

[33]

BY MR. SMITH:

Q. Mr. Collins, in addition to those two letters, your file that previously has been accepted into evidence here, reflects a request for a conscientious objector's classification.

THE COURT: What was the date of that?

MR. SMITH: December 12, 1967.

BY MR. SMITH:

Q. Would you please tell the Court the circumstances of that particular request?

A. It was my intention say as of the summer of 1967 to talk to the draft board or appear first in front of the board.

THE COURT: Tell me about your religious intentions; what was the basis upon which you filed, that all would like to know that.

THE WITNESS: Well, my basis, if I would have filed it, would have been that I personally do not feel there is any such thing as a just war. I mean, I don't think you can justify the killing of that many innocent people for nobody's ideology. So my contention is, or that is my religious

[34]

belief and my religious training.

THE COURT: And that is the basis of your conscientious objector

THE WITNESS: Yes, because my religious training, and my beliefs are such that I cannot personally support any war, and this is going to be the basis of my filing for a conscientious objector's status.

THE COURT: So then it didn't have anything to do with religion?

THE WITNESS: I think that is a religious claim, and if you mean my own religion, I am Baptist, but my training–

THE COURT: You follow the Baptist religion? How often do you go to church?

THE WITNESS: I go to church, I think, as often as most people.

THE COURT: How often is that?

THE WITNESS: Well, if you mean throughout my life, or currently?

THE COURT:

[35]

Come, now, you know what I am talking about. You were the one that mentioned it.

THE WITNESS: No, I don't know what you are talking about.

THE COURT: Do you go once a week? Do you go once a month? or do you go twice a year?

THE WITNESS: I would say that I go to church maybe once a month.

THE COURT: Maybe once a month, or maybe not once a month?

THE WITNESS: Well, it depends--about once a month.

THE COURT: All right. I am not trying to be critical, but I was just asking you the question–

THE WITNESS: Well, I didn't understand your question, and I was asking whether you asked me how long in duration, I mean, that is what I wanted to say.

BY MR. SMITH:

Q. When you received the SS 150 from the board, who gave it to you?

[36]

A. The clerk.

Q. Miss Stelljes?

A. Miss Stelljes.

Q. When she gave it to you, that is the one she gave you, the Form 150, and you had previously given her the 119, the one where you made the request?

A. Yes, sir.

Q. Did she say anything to you?

A. She said that she was giving me the conscientious objector form, but she also said that the induction notice superseded any other sort of application you would make.

So, on the one hand she gave me the conscientious objector form, and on the other she gave me the induction notice, or the letter. It was a notice, a letter.

Q. Saying to report for induction? Which one did she give you first?

A. I really don't know--I can't be sure.

Q. Did she give them to you at the same time?

A. Well, she had both, and, in other words, she–

THE COURT: He has already said that he doesn't know, Mr. Smith. Now he is speculating one way or the other.

MR. SMITH: All right.

BY MR. SMITH:

[37]

Q. Did she say anything to you other than that?

A. Well, she had me to write a letter to the effect that I had received the induction, the letter of induction, and to sign it. And she also had one of the other workers in the office to sign it as a witness.

Q. And that was all that occurred on that occasion?

A. That was all.

Q. Did you ever have occasion to talk to an FBI agent in connection with this 150 Form which you had?

A. Prior to going to the Selective Service office, two FBI agents——

Q. When was that? If you can't give it to me exact——

A. Sometime in November.

THE COURT: What year?

THE WITNESS: November of 1967.

THE COURT: Of 1967?

THE WITNESS: Right. And they came to my house at that time, pursuant to my, supposedly, having not reported for induction in October.

[38]

I told them the circumstances surrounding that, and I was informed by them, they asked me had I ever made my beliefs known to the Selective Service. I told them that I had appeared before and talked to one of the officials, but I don't know his name, again, and this was the reason for getting the other induction notice in October.

He then informed me that I should reapply, or attempt to apply for objector status, which I did on that date.

BY MR. SMITH:

Q. And that was the basis for your asking Miss Stelljes for

the 150 form?

A. Yes, sir.

Q. And when you appeared before the board and expressed your feelings and standing, will you tell us what your feelings were because you didn't tell us when you answered the question?

MR. MURRAY: I don't believe that the status that he appeared before the board is relevant.

MR. SMITH: He said that he appeared before someone, so let me just ask him who it was.

THE WITNESS: I went to the draft board.

[39]

THE COURT: You went to the draft board office?

THE WITNESS: To the draft board office, and it must have been probably about the 18th or 19th of September, of 1967.

And at the time I went there, I went to tell them that I had, because the induction notice, the first induction notice had been sent to Ann Arbor, Michigan, and at which time I was in New Orleans, and I had informed this draft board that I would be in New Orleans at that time, and I had not received it, and what then should I do.

The clerk then talked to someone in the back office——

THE COURT: Whom did you talk to?

THE WITNESS: I talked to the clerk.

THE COURT: To Miss Stelljes?

THE WITNESS: Miss Stelljes, and she sent me out to confer with an official in the back. She sent me to him, and I can't recall the name.

I talked to him about fifteen or twenty minutes, and he told me that he could not entertain any new

[40]

application or ideas, and that I would probably——he asked me,

first of all, would I be at any address in New Orleans, my New Orleans address that I had given, and I said that I would be there.

He said that I would probably not be sent another induction notice, but I would be sent a letter stating that I would be inducted with the next call of inductees, which I think was October 25th of 1967.

THE COURT: I thought you were there in November. I thought you said you were there one day in November.

THE WITNESS: I said September.

THE COURT: You said September?

BY MR. SMITH:

Q. Did you talk with this man, this person about your conscientious objections?

A. I told him that I would like to apply for a conscientious objector form, and, again, well, he told me that since I already had an induction notice, that he could not entertain any applications or new ideas concerning my case. I had already received one induction notice, and would receive another letter of induction for the October call.

[41]

THE COURT: Why didn't you file that sooner than you did?

THE WITNESS: Well, first of all, I knew—

THE COURT: If you felt so deeply about it?

THE WITNESS: Because I knew, what I wanted to do was come and meet the draft board personally that fall, before I went back to school. This was my intention.

BY MR. SMITH:

Q. The fall of what year?

A. The fall of 1967, September.

I found out that I had a letter in Michigan from my draft board. It was forwarded to me.

When I go the letter and found out that it was an induction notice, I went to the draft board because the date that they asked to be inducted, had passed.

THE COURT: So your answer to the question is this, as I appreciate it, that you wanted to make a personal appearance rather than file a written notice?

THE WITNESS: Right. After I got the induction notice, this is when

[42]

I made my personal appearance.

THE COURT: Then it was too late?

THE WITNESS: Yes, according to the regulations.

THE COURT: According to the regulations, right?

MR. SMITH: That is all.

**CROSS EXAMINATION**

**BY MR. MURRAY:**

* * * * *

[47]

Q. Now, you testified that you went into your local board to get a conscientious objector's form, is that correct?

A. Yes, that is correct.

Q. Now that, if I remember correctly, was in December of 1967?

A. Right.

Q. And you had registered for the draft back in January of 1963, is that correct?

[48]

A. I suppose so, and I can't be sure as to dates, but I believe that I got my—

Q. Well, that is approximately when you would have become eligible for the draft, is that correct?

A. Yes.

Q. It took you five years then to decide that you were a conscientious objector?

A. No, it did not.

Q. Why did you not apply for that status before?

A. Well, the regulations of the Selective Service are such that I don't think persons turning 18 years are aware of all of the classifications that do exist for people.

Q. You were aware of the 2-S classification, weren't you?

A. Well, that is simply because that is public notice today, through the school system.

Q. But you got that classification, didn't you?

A. That is almost an automatic classification. That's almost automatic, by virtue of being a student.

THE COURT: Let me ask you this: are there more than these two letters in question from the defendant in this file?

MR. SMITH: There are three letters in question, one a change of address letter, and——I stand to be corrected on

[49]

that—

THE COURT: I don't mean what is in question; I mean what is in the file, because I want the witness to bring me a copy of every letter that he ever wrote this draft board. I am going to find it funny if you have copies of these two letters, and the other notice or letters that you sent you do not have copies.

THE WITNESS: Well, I have.

THE COURT: And you have told me on the stand, under oath, that you keep copies of all of these matters.

THE WITNESS: I have copies. I have copies of all letters.

THE COURT: I want you to bring every letter, not just

those two letters that you spoke about, but copies of every letter that you directed to this draft board.

BY MR. MURRAY:

Q. Now, relative to this conscientious objector's form that you went and asked for, this was after you had been ordered to report for induction, is that not correct?

A. Yes.

Q. Now, you said you were given the form when you

[50]

requested it?

A. Yes.

Q. Did you ever turn it back in?

A. No, because when they gave me the form I was told that this induction notice that I received on that same day superseded the conscientious objector form.

If that was the case, I could see no reason for filing the CO Form, when the induction notice was the valid one, so why the application at that point?

Q. Mr. Collins, isn't it a fact that you were represented by counsel at the time you were failing to report?

A. No.

Q. Isn't it a fact that Mr. Smith wrote a letter to the draft board on your behalf?

A. After.

MR. SMITH: I object to the relevancy of this. I would like to know what the relevancy is.

MR. MURRAY: He is claiming that he doesn't understand what the Selective Service regulations were, and I am trying to find out if he had legal counsel at that time.

THE WITNESS: I know I did not, not at that time. That was–

[51]

I got legal counsel afterwards.

BY MR. MURRAY:

Q. At the time that you got legal counsel, did you have occasion to ask of him what your status would be as a conscientious objector, and whether or not you had a right to file for that status?

A. At that time we talked about it.

Q. Did you attempt then to come back and get another form or to send in the form that you had already gotten?

A. No, I did not.

Q. You did not?

So other than having sent the letter which was never received complaining of your status, you have done nothing else to appeal from this classification which was given you?

A. Well, you mean nothing else? I have appeared in front of the draft board. I have personally gone down to the draft board and talked about this, and each time I was given an induction notice. And each time I was told that the induction notice superseded any other application.

Q. And this was explained to you, what superseded meant?

A. In other words, what I mean is, that the application for CO is not going to be considered as long as

[52]

there is an outstanding induction notice.

Q. I understand.

In other words, you had failed to report for induction when you were ordered to do so.

A. That is not true.

Q. But there was an outstanding order?

A. Yes.

Q. And did you go through the induction process?

A. No, I never got that far.

Q. You didn't?

What Selective Service told you was then that until you obey the last order that was given through them to you, that they were not going to consider any further applications from you? Is that what you were told, in fact?

A. That is not true.

Q. Explain to me what you were told.

A. First of all, repeat what you said because it is so long that I don't think I recall everything you said.

THE COURT: You used the word "superseded," and can you explain what you meant by that? I think that is what Mr. Murray had in mind.

THE WITNESS: What I meant is when I talked to the officials and the offices of Selective Service, they told me that

[53]

since I had already been issued——

THE COURT: You say already had been issued?

THE WITNESS: Issued or sent an induction notice.

THE COURT: All right.

THE WITNESS: And that my application, or if I would apply for CO status, that it could not be considered because I had already been sent an induction notice.

THE COURT: Because you had already been sent an induction notice, I understand.

MR. SMITH: I think that that is fairly simply, he has stated it three or four times for us.

THE COURT: I thought that was what he said too.

MR. MURRAY: I think that is all.

THE COURT: So the issuance of an induction notice superseded any application that you might wish.

All right.

* * * * *

## REDIRECT EXAMINATION

**BY MR SMITH:**

* * * * *

[83]

Q. Mr. Collins, just for informational purposes, I believe that you previously testified that you went to your local board on December 12, 1967, to get a conscientious objector form, is that correct?

A. That is correct.

Q. Now, you said that you received certain information on that date, and for that reason you did not feel——I should say that for that reason you did not fill out the form and return it, is that correct?

A. That is correct.

Q. Now, you said that you were sent to a man in the back, is that correct?

A. That's correct.

Q. And would you recognize that man if you saw him today?

A. No, I would not.

Q. And you don't know what his name is?

A. I don't recall.

Q. Would you know the name if I were to tell it to you? Do you think you might recall it?

[84]

A. I doubt it.

Q. And what information did you say he gave to you when you went back there that caused you not to fill it out, as I understand, not to fill out your form and sent it in?

A. Well, first of all, I think that there is some confusion; it

was not on December 12th that I went back in the back. I had been to the Selective Service prior to that. I was over there, and that was in September.

Q. Of what year?

A. September, 1967, that I went to talk to the guy in the back.

Q. Go ahead. What did he tell you on that date?

A. And he told me that he could not entertain any new information, and that since there had been a previous induction notice sent, that I would probably be called up in the October draft call, and I would be notified by letter.

Q. You would be notified how?

A. By letter.

Q. Did you explain to him that you were a conscientious objector, and you wanted to pursue that status?

A. I did.

Q. What did he tell you?

A. As I said, he said that he could not entertain any

[85]

new information because I was already under an induction notice, and that the new induction notices for October would—not induction notice, but a letter saying that I would be inducted in the October call would come to my address on Fig Street.

Q. What did he tell you to do then, if anything, relative to your status?

A. He asked me would I be at the Fig Street address, and I said yes.

Q. And you told him you wanted to be a CO? And what did he tell you relative to that?

A. I did not tell him that I wanted to be a CO; I told him that there was some certain—well, some certain new information that I wanted to present to the draft board. He

said he could not entertain any new information as I was under an induction notice, and this took precedence.

Q. But you did not even tell him what you wanted?

A. Well, I did not see any need to go into detail about anything when he was explaining to me that he could not entertain any new information.

Q. Let's go now to the December 12 date of 1967, when you sent and got this conscientious objector's form, and what was it, if anything, that you were told then that made you not pursue this CO status?

A. I was given an induction notice date, I think,

[86]

about five days after that, and, again, I was informed that I was to report on that date; and the induction notice took precedence over the other information, the other form.

Q. Was it explained to you why you were given the form if it had no use? Was there any explanation given?

A. There was a phone call made, but to whom I don't know, at which time the clerk came back and gave me the CO form. She did not originally want to give it to me.

Q. I see. Go ahead.

A. And after she made a phone call, she did.

Q. But you never did fill it out and send it in, did you?

A. No.

Q. And for what reason did you not do this?

A. Because, as I have stated before, I was informed that the induction notice took precedence over the conscientious objector form.

Q. Were you ever told that the form would not be considered if it were sent in?

A. I was told that it took precedence. I mean, in the explanation he actually never did definitely say that it would not never be considered, but I was led to believe that it

would not be.

Q. Did you ever ask anyone what was meant by "took precedence over——"

[87]

A. Well, she said to me, you see, that she could not entertain any new information, so I took for granted that they would not receive the CO form, because this would be new information.

Q. But she gave you the form, and you assumed that she would not receive the form back even though she gave it to you, is that correct?

A. That is correct, because she said that she could not receive any new information.

THE COURT: Well, what would be the reason for giving you the form?

THE WITNESS: I don't know. I asked for the form, and she gave it to me after making the phone call.

THE COURT: You didn't ask her, "You are giving me a form, yet you tell me that it is too late? Why are you giving me the form?"

THE WITNESS: I didn't say it in that form; I said, why the induction notice? She said, "I was informed to give you the CO form, but also to give you an induction notice." She said, "I am going to have a witness, and to have you write a letter saying that you have received this letter in

[88]

person."

THE COURT: And had you received the induction notice as of the moment you got that form?

THE WITNESS: They were both given then.

THE COURT: They were both given to you simultaneously?

THE WITNESS: That is correct.

BY MR. MURRAY:

Q. Now, did you have occasion to check any further into this matter about being a CO?

A. No.

Q. You were a conscientious objector in your opinion, were you not?

A. Definitely.

Q. And didn't you feel that you wanted that status?

A. I did, and I do at this time.

Q. And you never pursued it any further, though?

A. No, because, as I said, I was issued an induction notice.

Q. Did you have occasion to talk to your attorney about this matter.

A. At that time, after the induction notice, I did

[89]

talk to my attorney.

Q. Approximately how long after this?

A. On the same day as the induction notice.

Q. In the same day that you got the conscientious objector form?

A. No, the same day that I reported for induction, on that particular day I talked to an attorney.

Q. Had you ever spoken to an attorney about the matter prior to the time that you reported for induction?

A. No.

Q. Just so we keep the record straight, on what induction are you talking about? Which one of the notices?

A. The one for the--the date? I don't know the exact date.

Q. Would that be the induction that you were ordered to report at the time that you went into the induction station? That is the one handed to you personally, is that correct?

A. Right.

Q. I have the date, and I am trying to get the page number of the document here—

Now, I show you a document that is contained in the exhibit G-1, and is marked as page 66, and I ask you if that statement written on there in longhand was written by you?

[90]

A. Yes, it was.

Q. Was it signed by you?

A. Yes, it was.

Q. And was that statement relative to the notice that was handed to you on December 12th?

A. Yes, it is.

Q. Now, if you would read the statement that you wrote out there in longhand?

A. "I hereby state that I have received a letter dated December 12, ordering me to return for induction on December 15, 1967, and handed to me by the clerk of Local Board 156, Walter J. Collins."

Q. So that from the date of December 12, three days later was when you were ordered to report, is that correct?

A. That is right.

Q. And it was on that date that you spoke to an attorney about this matter?

A. That is correct.

Q. So then it would be, if I am correct, you were told, although you were given a CO form, you were told that it wouldn't do you any good?

A. That is right.

Q. But three days after you were told that, you had occasion to consult with an attorney about your Selective Service rights?

[91]

A. That is right.

Q. And after consulting with your attorney, you did not pursue your CO status any further, is that correct?

A. I put it in the hands of my attorney.

Q. So the answer to my question is that you did not pursue your CO status any further, is that correct?

A. I guess not.

Q. One further thing, for the record, Mr. Collins, you do understand that you are under oath? Is that correct?

A. That is correct.

Q. And it is your testimony that the letter D-3 that you have identified, and D-4 which you have identified, were written on the date that are designated on the exhibits, is that correct?

A. That is correct. You are right, yes.

Q. And the letter D-5, which you have identified, although there is no date on here, you have identified it as having been written at the same time as you wrote the letter which this is a duplicate of, and which appears in your file?

A. That is correct.

Q. And that is February 1 of 1967, is that correct?

A. That is correct.

MR. MURRAY: I have no further questions, your Honor.

## Testimony of Catherine R. Stelljes

[Record, Vol. II, pp. 140-146]

[140]

### DIRECT EXAMINATION

BY MR. SMITH:

Q. Miss Stelljes, you are secretary for Local Board 156?

A. Yes, I am.

Q. And how long have you been secretary?

A. Since 1948. Or, may I say that Board 156, I think, was created in 1951.

Q. You have been the only secretary that board ever had?

[141]

A. Right.

Q. Miss Stelljes, how many members are on that board?

A. Presently we have six members.

Q. And have you always had six?

A. No, we have not always had six?

Q. When you first had the board formed, how many members did you have?

MR. MURRAY: We object to any question other than as to the board at the time this defendant was classified; everything else is irrelevant to this case.

MR. SMITH: I will rephrase the question.

BY MR. SMITH:

Q. At the time this defendant was first classified, in January, 1963, how many members did you have?

A. We had three.

Q. You had three members?

A. Yes.

Q. Who were they?
A. Mr. McCollom, Mr. Chris Everett, and Mr. Forest Minx.
Q. Were they all white men?
A. Yes, they were.

[142]

Q. To your knowledge has a negro ever served on this board?

MR. MURRAY: The government is going to respectfully object to that question because of the fact that the same issue was raised at the time of the motion to quash the subpoena. The defendant has not, and does not have standing to raise the Constitutional issue relative to makeup of the board, insofar as he has not exhausted his administrative remedies.

Insofar as the evidence adduced that has been made applicable to this hearing, the government feels that we have adequately established that he does, and it is our position he does have a right to show this board, which was sitting, had acted arbitrarily or prejudicially towards him. But we submit that that is the only allegation in his petition which he should be allowed to pursue at this time, because of his lack of standing, in view of the fact that he did not exhaust his administrative remedies.

MR. SMITH: In the Lockhart case, which is the one your Honor had reference to in the previous discussion, apparently the Ninth Circuit decided that case on the basis of failure to appeal, which was failure to exhaust, or, as the Court has filed it in the opinion reported in Law Week, it was

[143]

a waiver, or could be considered as based upon ignorance, and said that under those circumstances there could be an attack.

In this case, if your Honor recalls the previous testimony given by this particular defendant, there was an attempted appeal, insofar as he says, that is, his letter, a copy of which he said that he wrote and sent to this board. So, it would seem to me that there was an attempt on his part, and there was no ignorance on his part, but at least an attempt to utilize—

THE COURT: Well, I will overrule the objection and let the witness answer.

BY MR. SMITH:

Q. Miss Stelljes, has there ever been a negro serving on Board 156 since it was formed?

A. We have had a negro appointed in – could it be May of 1967?

Q. In May of 1967?

A. We have had a negro appointed, but I am not quite sure, but I think it was in May of 1967?

Q. And that is Mr. Masson?

A. Yes, Mr. Masson.

Q. And this board was formed when?

A. In 1951.

[144]

Q. How many members are there on the board now?

A. Presently, six.

Q. Five white men and one negro man?

A. Yes.

Q. Now, Miss Stelljes, when the board met in January of 1963, on the 24th to classify this man, and they did so classify him from the previous non-classification to 1-A, how many members were present?

A. I would really have to look at the record to see how many.

Q. And you would have to look at the minutes, wouldn't you?

A. Yes

Q. Was there a quorum present?

A. Yes, there must be a quorum.

Q. And a quorum is how many?

A. With a three man board a quorum would be two.

Q. And do you know the vote on his classification?

A. Offhand, there, again, I would have to look at the record.

Q. Was there any discussion about the classification?

A. None that I can remember.

Q. Do the minutes show that?

A. No, sir.

Q. If there was a discussion, would not the minutes

[145]

show it?

A. If there was some, – if he had been granted an appearance, of if there was something unusual, perhaps the minutes would show it.

Q. Would the minutes show how many men were classified that night?

A. Yes.

Q. And it would show the vote on each one of them?

A. Yes.

Q. And it would show if there were any special cases considered?

A. Yes.

Q. That would be true of every meeting that dealt with this man?

A. Yes, sir.

Q. Is it this board's policy ever to reopen a case for hardship or for any other reasons?

A. Yes.

Q. After a notice of induction has been sent?

A. Oh, after a notice of induction?

Q. Yes, ma'm?

A. We would perhaps have to get permission from the state. No, we wouldn't have to get permission, and the case could be reopened, yes.

Q. On what ground?

[146]

A. We have a regulation, I think, whereby if the board considers this unusual, you may reopen a case to reconsider the new evidence presented.

Q. And have you ever reopened a case after the pre-induction physical notice had been sent?

A. I would think that the board has.

Q. On the same ground?

A. On unusual circumstances, yes.

* * * * *

**Testimony of Forrest Lee Minnix**

**[Record, Vol. II, pp. 191 - 193, 198]**

[191]

**DIRECT EXAMINATION**

BY MR. SMITH:

Q. Mr. Minix, you are the Chairman of this Local Board number 156?

A. Yes, sir.

Q. That is the Board that this defendant was registered with initially, is that correct?

A. Yes, sir.

Q. How long have you been Chairman, Mr. Minix?

A. Approximately four or five years.

Q. And there are how many members on the Board now?

A. One, 2, 3, 4, 5; I believe there is six of us.

Q. It is Mr. Clay, Mr. McCollom, Mr. Dutrey, Mr. Mason, and Mr. Molony?

A. Yes.

Q. Is that correct?

A. Is that six? Yes.

Q. Six altogether, including yourself?

A. Yes, sir.

Q. Were they on the Board when you first became a member of the Board?

[192]

A. No, sir.

Q. Are they all new?

A. Yes, since I have been on the Board, yes, they are all new.

Q. Who appointed you, Mr. Minix?

A. What do you mean "appointed"?

Q. From whom did you receive your commission, or your certificate authorizing you to serve?

A. From the Selective Service system, I assume the president.

Q. I am sorry, but I didn't hear?

A. I think the certificate reads that the president named me –

Q. The president appointed you, did he not?

A. Yes, sir.

Q. Do you know who recommended your name to the president?

A. Mr. Ledbetter.

Q. Who is he?

A. He is a deceased Board chairman of 156.

Q. Did he have to recommend you through either the governor or the major?

A. I don't recall – that has been some years ago, you know.

Q. And you say that you have been a member for five

[193]

or six years?

A. No sir; I have been chairman, but I have been a member for probably – I don't remember the exact date – I will say at least ten or eleven years.

Q. Ten or eleven years?

A. Yes, sir.

Q. In the ten or eleven years that you have been a member, has a Negro ever served on that board?

MR. MURRAY: For the record, we want to enter the same objection that we have before that it is irrelevant and immaterial to the motion to dismiss, giving the judge's prior ruling, your Honor, and I am talking about as to the motion to quash the supoena.

THE COURT: I will maintain the objection.

* * * * *

[198]

Q. Now, on those files that you have there, and I will go back to my original question, on those lists, those large numbers of young men that are listed behind the cover page, showing the vote, were those votes taken individually, or were they taken on a group of files in sort of a – well, collectively, as I put it?

A. I would say they were taken collectively rather than individually, although some of them that are listed may have

been taken individually.

Q. And you have no recollection as to whether or not Walter Joseph Collins' file was voted on individually or collectively, I take it?

A. None whatsoever.

Q. One further question; but of those listed on those long lists that you have, you would say that the great number of those were voted on collectively, I take it?

A. Yes, sir.

THE COURT: Would that be the group that you called routine, sir?

THE WITNESS: Yes, sir.

* * * * *

## Testimony of Louis C. Mason, Jr.

[Record, Vol. II, pp. 225-226]

[225]

### DIRECT EXAMINATION

BY MR. SMITH:

Q. Mr. Mason, you are a member of Local Board 156?

A. Yes, sir.

Q. When were you appointed?

A. In may of 1967.

Q. In May of 1967, and that is last year?

A. Yes.

Q. Are you the first Negro that has ever served on the board, Mr. Mason?

A. I think so, yes.

Q. Who appointed you? I know it was the president, but who recommended you to the president?

A. I don't know who I was recommended by.

Q. You don't know when this Board was formed, do you?

[226]

A. I don't know who I was recommended by.

Q. You don't know when this Board was formed, do you?

A. No, sir.

Q. Mr. Mason, to your knowledge, are you the first negro to serve on any draft board in the New Orleans area?

A. To my knowledge –

MR. MURRAY: Objection, your Honor.

THE COURT: The objection is maintained; he doesn't know unless he went out and checked the official records, and I don't think he has done that. He is only going by hearsay, among other things, so I don't think that he is competent to answer that question.

MR. SMITH: I have no further questions.

MR. MURRAY: We have no questions of Mr. Mason.

THE COURT: Mr. Mason, you are excused. Thank you.

## APPENDIX I

**Excerpt from Transcript of Proceedings on Defendant's Motion to Dismiss the Indictment, March 19, 1969 U.S. Dist. Ct., E.D. La., Hon. Frederick J.R. Heebe, U.S. District Judge, presiding**

**Testimony of Forest Lee Minnix**

**[Vol. III, pp. 3-6]**

[3]

### DIRECT EXAMINATION

BY MR. SMITH:

Q. Will you state your name for the record, please?

A. Forrest Lee Minnix.

Q. Mr. Minnix, where do you live?

A. Covington, Louisiana.

Q. In Covington, Louisiana?

[4]

A. Yes, sir.

Q. And how long have your lived there?

A. Since October 1st, 1959.

Q. When were you appointed to this local board that we are dealing with here today?

A. I don't remember the exact date, but I think it was either 1957 or 1958, somewhere in that period.

Q. You were living here in the city at the time?

A. Yes, sir.

Q. And then you moved to Covington?

A. Yes, sir.

Q. When were you made chairman of the board?

A. I can't recall the date, but it was approximately upon the death of Mr. Webb, whatever date that was.

Q. You can't recall the year maybe?

A. Possibly '64, or '65. It was in that area somewhere.

Q. To your knowledge are the other members of the board residents of the Parish of Orleans?

A. To my knowledge, yes.

Q. Now, you are no longer on the board?

A. No, sir.

Q. Is that correct?

A. That is correct.

Q. When did you leave the board?

[5]

A. Within a matter of just a few months ago; it perhaps was in January, as I recall, of '69. It was either January or December of '69, as I recall.

Q. Could you tell us the circumstances under which you left the board?

A. I was informed by the, I presume it was District Headquarters – I don't remember the extra letter – I had to complete a questionnaire giving my residence, which I did, and return it to them.

And upon receipt of this information they advised me that I would be asked to resign because I no longer resided in this parish. And, which I did.

Q. Was that the first time you had ever had such a questionnaire to fill out?

A. Yes, sir.

Q. Did you ever fill one out when you were first appointed to the board?

A. I possibly filled some form of questionnaire, but I don't recall it. It has been so long ago, you see.

Q. How did you get on the board? Do you recall those

circumstances, Mr. Minnix?

A. I was asked to serve at the time by Mr. Ledbetter, who formerly introduced me to the board and the Selective Service System appointed me, I assume. I don't recall the exact –

[6]

Q. And that is the best that you recall –

A. I was asked if I would serve by Mr. Ledbetter.

Q. And Covington is approximately thirty miles away from here, is it not, across the lake?

A. Yes, sir.

Q. Just for the purposes of the record, that is correct?

A. Yes, sir.

MR. SMITH: That is all that I have.

## CROSS EXAMINATION

BY MR. MURRAY:

Q. Mr. Minnix, did you ever discriminate against any person who happened to be from Orleans Parish because of the fact that you lived in another parish?

A. No, sir.

Q. Specifically, did you ever treat the defendant in this case, Walter Joseph Collins, any different because of the fact that he was a resident of Orleans Parrish and you were over in St. Tammany Parish?

A. No, sir.

MR. MURRAY: I have no further questions.

* * * * *

## Testimony of Catherine R. Stelljes

[Record, Vol. III, p. 8]

[8]

### DIRECT EXAMINATION

* * * * *

BY MR. SMITH:

Q. What is your jurisdiction, Miss Stelljes? What is the board's jurisdiction?

A. It comprises the entire 17th Ward and a portion of the 14th Ward.

Q. What about the 16th Ward?

A. None of the 16th Ward.

THE COURT: So it is all of the 17th and part of the 14th?

THE WITNESS: All of the 17th and a small part of the 14th Ward.

## APPENDIX J

**Excerpt from Transcript of Proceedings at Trial, June 23, 1969**
**U.S. Dist. Ct., E.D. La., Hon. Edward J. Boyle, Sr.,**
**U.S. District Judge, presiding**

**Testimony of Walter Joseph Collins**

**[Trial Proceedings, pp. 154-158]**

**DIRECT EXAMINATION**

BY MR. SMITH:

* * * * *

[154]

Q. You reported back to the Draft board here on what date?

[155]

A. On the 18th.

Q. All right.

A. And at which time I was told by one of the Draft Board Officials – I do not know his name at this time – that they could not entertain any new information since I was under this induction order, but that I would be issued another induction order on October 25–rather, a letter of induction October 25.

Q. All right.

A. At which time, they asked me what would be my current address, and I gave them the Fig Street address. And on October 25, I think I was ordered to report at 6:45 in the morning. I was – I must have gotten to the induction center

shortly after 7:00 or five minutes after seven, at which time I had literature and an anti-war button and the guard told me I could not enter the building with it. And I asked him why and he said it was a policy that you could not distribute literature in a public building, and so then I told him that I had business to attend there, that I had to see people, and he said he did not care, that was

[156]

the policy, that you just don't come in with literature.

BY THE COURT: Did you tell him you had a notice to report for induction?

A. I told him I had a notice to report for induction. At which time, he told me that he also had instructions that after seven o'clock that it was not compelled to let anybody in, that you were more or less considered delinquent, and I went home. I don't know, sometime in November, I guess, the FBI came to the Fig Street address and talked to me and asked me what happened down there, and general questions about my feelings on the war, I suppose, and told me to go back to the Draft Board. At which time, they told me that I should qualify for the same application and I should go to the Draft Board for such, and I did. This time they gave it to me.

BY MR. SMITH:

Q. Who did you ask?

A. Well, I talked to the Clerk, Miss Stelljes.

Q. The Clerk?

A. Of the Local Board, I guess, 156, at which time she said she would have to confer with other

[157]

officials. And she went in the back and made a phone call, and then she had me to sign a letter to the effect that she

was, in fact, giving me an induction order. And I signed the letter and she had another one of the workers in the building to witness that, and she gave me the induction order dated, I think, five days afterwards. And she also gave me the CO application, when she told me that the induction order took precedence over the CO application and it would do me no good to file one, so I didn't.

That induction order was for the 15th of December, of 1967, at which time I reported: There was a demonstration out in front of the building. Again I picketed with signs, and shortly before seven o'clock I went into the building, at which time the guard told me he had seen me outside picketing and that he could not allow me in. I showed him my letter of induction, and he told me he didn't care what the hell I had, I had to get out, and that I was thrown out, physically out, of the induction center, out of the Custom House Building, and again I came home.

And that same day I contacted you about the events.

* * * * *

LIBRARY
SUPREME COURT, U. S.

No. 493

Supreme Court, U.S.
FILED
OCT 27 1970
ROBERT SEAVER, CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1970

---

WALTER J. COLLINS, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

ERWIN N. GRISWOLD,
*Solicitor General,*

WILL WILSON,
*Assistant Attorney General,*

ROGER A. PAULEY,
EDWARD FENIG,
*Attorneys,*
*Department of Justice,*
*Washington, D. C. 20530.*

# INDEX


| | Page |
|---|---|
| Opinion below | 1 |
| Jurisdiction | 1 |
| Questions presented | 2 |
| Statement | 2 |
| Argument | 5 |
| Conclusion | 11 |


## CITATIONS

Cases:


| | |
|---|---|
| *Breen* v. *Selective Service Board*, 396 U.S. 460 | 8 |
| *Chaudron* v. *United States*, 425 F.2d 605 (C.A. 8), certiorari denied, October 12, 1970 (No. 5426, this Term) | 6 |
| *Clark* v. *Gabriel*, 393 U.S. 256 | 7, 8 |
| *Clay* v. *United States*, 397 F. 2d 901, vacated *sub nom. Giordano* v. *United States*, 394 U.S. 310 | 6 |
| *Czepil* v. *Hershey*, 425 F. 2d 251, certiorari denied, October 12, 1970 (No. 244, this Term) | 6 |
| *Gonzales* v. *United States*, 364 U.S. 59 | 10 |
| *Jessen* v. *United States*, 242 F. 2d 213 | 7 |
| *McGee* v. *United States*, No. 362, this Term, certiorari granted, October 19, 1970 | 11 |
| *McKart* v. *United States*, 395 U.S. 185 | 8, 10 |
| *Simmons* v. *United States*, 406 F. 2d 456, certiorari denied, 395 U.S. 982 | 6-7 |

Cases—Continued Page

*Sumrall* v. *United States*, No. 711 Misc., October Term, 1968, certiorari denied, 393 U.S. 991 ..... 8
*Toussie* v. *United States*, 397 U.S. 112 ..... 8
*United States* v. *Beltran*, 306 F. Supp. 995 ..... 9
*United States* v. *Brooks*, 415 F. 2d 502, certiorari denied, 397 U.S. 969 ..... 6
*United States* v. *Dominguez*, No. 42908, N.D. Cal., decided September 26, 1969 ..... 9
*United States* v. *Prince*, 398 F. 2d 686, certiorari denied, 393 U.S. 946 ..... 6

Statute and regulations:

50 U.S.C. App. 453 ..... 7-8
50 U.S.C. App. 460(b) ..... 5, 7
50 USC App. 462(a) ..... 2
32 C.F.R. 1604.52(c) ..... 5, 6
32 C.F.R. 1604.54 ..... 7
32 C.F.R. 1621.6-1621.7 ..... 8
32 C.F.R. 1622.10, 1622.25 ..... 8
32 C.F.R. 1622.15 ..... 8

# In the Supreme Court of the United States

OCTOBER TERM, 1970

---

No. 493

WALTER J. COLLINS, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

### OPINION BELOW

The opinion of the court of appeals (Pet. 1a-6a) is reported at 426 F.2d 765.

### JURISDICTION

The judgment of the court of appeals was entered on April 27, 1970. A petition for rehearing was denied on June 12, 1970. Mr. Justice Black extended the time for the filing of a petition for a writ of

certiorari to and including August 1, 1970, when the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, petitioner could lawfully disobey orders of his local board to report for induction on the ground that the board was defectively constituted.

2. Whether petitioner was misled by the advice of local board officials into not pursuing a claim for conscientious objector status.

## STATEMENT

After a jury trial in the United States District Court for the Eastern District of Louisiana, petitioner was convicted on five counts of a six count indictment which alleged that, on separate occasions in 1967 and 1968, he had failed to obey orders to report for and submit to induction, in violation of 50 U.S.C. App. 462(a). On July 9, 1969, he was sentenced to concurrent terms of five years imprisonment and fined $2,000. The court of appeals affirmed *per curiam* (Pet. 1a-6a).

1. The evidence showed that petitioner registered in early 1963 with Local Board 156 in New Orleans, Louisiana and was classified I-A (3 R. 7-12).[1] He

[1] "R." preceded by the volume number designates the four volume record on file with the Clerk of this Court. Volume 1 contains the district court records, including the June 1969 trial transcript referred to herein as "Tr." Volume 2 contains the transcript of a pretrial motion to dismiss the indictment. Volume 3 is a second pretrial supplement.

was thereafter granted a student (II-S) deferment. Upon completion of his college studies in January 1967, he was again classified I-A (Tr. 66-67). He took no appeal from this classification (2 R. 8).[2] In June 1967, petitioner passed the pre-induction physical (Tr. 47), and was so notified in July 1967 (Tr. 70).

Petitioner was thereafter ordered to report for induction on six occasions, three times in 1967 (September,[3] October and December) and three times in 1968 (January, February and March). On each occasion, he either failed to report at all, or, if he did report, he failed to submit to induction (Tr. 72-89). On December 12, 1967, the day when his third notice to report for induction was issued, petitioner first indicated that he might be a conscientious objector by requesting and obtaining from the local board clerk the special form for conscientious objectors. He never returned the completed form to the local board (2 R. 18-19, 33, 84, 86). Three days later, his retained attorney, who was experienced in Selective Service cases, wrote to the local induction center alleging that when petitioner had reported as ordered for induction on December 15, 1967, as well as on a

---

[2] In his first pretrial motion to dismiss petitioner stated he had either complained or inquired as to this classification. In support, he submitted a copy of a handwritten letter that he claimed to have mailed to his local board. Such a letter was never received by the board and the district judge specifically found that petitioner had not taken an administrative appeal (1 R. 101, 2 R. 9, 30, 42, 68, 146).

[3] Petitioner was acquitted on Count 1, which alleged the failure to report in September 1967.

prior occasion, he was prevented from submitting to induction because of his peaceful protest activities. The letter stated that petitioner "stands ready, willing and able to be inducted into the Armed Forces" and advised that if petitioner was reordered for induction and not subjected to harassment, he would take the oath (Ex. G-1, pp. 80-83). Special arrangements were thereafter made for petitioner to be escorted through the induction process by a Selective Service official. Petitioner reported but declined to submit to induction (Tr. 127-136). After the fourth order to report (in January 1968) with which petitioner also failed to comply, he absconded to Canada.[1] Upon his subsequent return to New York, he was apprehended (Tr. 162-163).

2. Before trial, petitioner moved to dismiss the indictment on the ground, *inter alia*, that Negroes had been systematically excluded from his Louisiana draft board (1 R. 19, 2 R. 112, 136, 142). Thereafter, he filed another pre-trial motion challenging the residency composition of his local board. The district court conducted a hearing on both motions.

The facts adduced at this hearing showed that in January 1967, when petitioner was classified I-A, the local board had consisted of five white members (2 R. 141, 191, 225). In May 1967, a Negro member was appointed, raising the board's membership to six (2 R. 143). The former chairman, Mr. Minix, testified that he had served on the local board from about

---

[1] As in the court below, petitioner here concedes that he failed to report for induction on at least one occasion (Pet. 6).

1958 to January 1969. Without the knowledge of the Selective Service System, he had moved in 1959 from the parish (county) where the local board was located. When this change in residence was discovered, Mr. Minix was asked to resign; he did so in January 1969 (3 R. 4-5). The other board members were residents of the parish (county) where petitioner's local board was located (3 R. 4). The motions to dismiss were denied by the district court (see Pet. 29a-37a, particularly at 35a-36a).

In an offer of proof at trial, petitioner asserted that several members of the local board were not residents of the area within the county administered by the local board (Pet. 38a-39a).[7]

## ARGUMENT

1. Petitioner contends that his local board was improperly constituted with respect to the residence and race of its members and, accordingly, that the board lacked jurisdiction to issue a lawful order directing him to report for induction.

That certain members of the local board may have resided outside the geographic area[7] serviced by the

---

[5] The statute requires that board members live in the county (except where provision is made for an inter-county board) over which the board has jurisdiction, 50 U.S.C. App. 460 (b) (3) (see Pet. 10a-11a).

[6] By Selective Service regulation (32 C.F.R. 1604.52(c); see Pet. 15a) board members are required, "if at all practicable" to be residents in the area over which the board has jurisdiction.

[7] While petitioner made an offer of proof to this effect (Pet. 38a-39a), no proof on this issue was actually adduced at trial.

local board did not deprive the orders of the board of legal effect. The residency requirement stems from a regulation (32 C.F.R. 1604.52(c)) which provides that local board members shall be residents of the county in which the local board sits and "shall also, if at all practicable, be residents of the area in which their local board has jurisdiction." Noncompliance with this regulation does not, however, nullify the action of the local board, whose acts, like those of a malapportioned legislature, "are acts of a de facto political authority." *Clay* v. *United States*, 397 F. 2d 901, 911 (C.A. 5), vacated on other grounds *sub nom. Giordano* v. *United States*, 394 U.S. 310; *United States* v. *Brooks*, 415 F. 2d 502 (C.A. 6), certiorari denied, 397 U.S. 969; see also, *Chaudron* v. *United States*, 425 F.2d 605 (C.A. 8), certiorari denied, October 12, 1970 (No. 5426, this Term); *Czepil* v. *Hershey et al.*, 425 F.2d 251 (C.A. 7), certiorari denied, October 12, 1970 (No. 244, this Term).

By the same token, the fact that a Negro did not become a member of the local board until after petitioner had been reclassified I-A—even assuming that this was the result of prior systematic exclusion of Negroes from membership on the local board—did not make the induction orders invalid or give rise to a valid defense absent any showing that this resulted in any discrimination practiced by the board on petitioner. *Clay* v. *United States*, *supra*; *United States* v. *Prince*, 398 F. 2d 686 (C.A. 2), certiorari denied, 393 U.S. 946; *Simmons* v. *United States*, 406

F. 2d 456, 460-461 (C.A. 5), certiorari denied, 395 U.S. 982. No showing of such discrimination was made here.

On the face of things, a more troublesome problem appears to be posed by the fact that, throughout the period of petitioner's dealings with the board (1963-1968), the residence of the chairman was not in accordance with the statutory requirement that board members must reside in the country or political subdivision in which the local board has jurisdiction (50 U.S.C. App. 460(b)(3)).[8] We note, however, that at the time of his original appointment the chairman was qualified to sit as a member. Thus his original appointment was valid, and our submission is that the *de facto* argument is applicable here as well in support of the actions of the local board. The board, as a political entity, had jurisdiction over petitioner (32 C.F.R. 1604.54) and the vote of the board regarding petitioner was unanimous. See *Jessen* v. *United States*, 242 F. 2d 213, 214-215 (C.A. 10).

At all events, the precise issue of the validity of the board's composition is not squarely posed in the particular circumstances of this case since petitioner's acceptability for military service was "not dependent upon an act of judgment by the Board." *Clark* v. *Gabriel*, 393 U.S. 256, 258. Petitioner was required to register when he attained the prescribed age, regardless of the composition of the local board (50

[8] As noted in the Statement, *supra*, pp. 4-5, the chairman had served on the local board from 1958 until his resignation in January 1969.

U.S.C. App. 453; cf. *Toussie* v. *United States*, 397 U.S. 112). Petitioner's deferment as a student from 1963 through 1967 rested on the fact that he met the specific requirements of the governing regulations (see 32 C.F.R. 1622.25); in any event, he can hardly be heard to challenge the composition of a board from which he received a deferment. Moreover, if in 1967 he had met the prescribed statutory conditions for a student deferment and the local board had nevertheless refused to continue him in that classification, he could have appealed administratively or secured preinduction judicial relief since the board at that time had no discretion in the matter. *Breen* v. *Selective Service Board*, 396 U.S. 460, 463-465; cf. *Clark* v. *Gabriel*, *supra*; *McKart* v. *United States*, 395 U.S. 185. Conversely, when in 1967 petitioner provided no information which would warrant continuation of the deferment, the local board had no choice but to classify him I-A (see 32 C.F.R. 1622.10, 1622.25). Petitioner thereafter passed the requisite physical examination and was found to have been called in proper sequence (Pet. 36a-37a). The order of priority of induction was therefore automatic (see 32 C.F.R. 1631.6-1631.7), and the board's role was essentially ministerial. See our Memorandum in Opposition in *Sumrall* v. *United States*, No. 711 Misc., October Term, 1968, certiorari denied, 393 U.S. 991.[9] It is therefore entirely artificial to argue that the

[9] We are providing petitioner's counsel with a copy of our *Sumrall* Opposition.

composition of the board had any impact on this case.[10]

2. Petitioner contends that his orders to report for induction were invalid because he was dissuaded from filing a conscientious objector claim by misleading statements of board officials (Pet. 16-17). Assuming arguendo that petitioner could have filed such a claim at the times to which he refers (see our Brief in *Ehlert* v. *United States*, No. 120, this Term), the fact remains that he made no such claim and he did not establish that he was in fact misled.

Petitioner refers to his testimony that in September 1967 (after his first order to report) he was told by an official of the local board (whom he could not identify) that the board could "not entertain any new information", because of the prior issuance of an order to report for induction (Pet. 5). Petitioner did not, however, inform this official that he wished to apply for conscientious objector status (Pet. 52a-53a). When asked why he had waited until December 1967 to request the form for conscientious objectors from the board, petitioner indicated that he had been unaware that such a classification existed (Pet. 47a). Petitioner further asserts that on December 12, 1967, when he received the special

[10] It is not insignificant in this connection to note that a district judge who has consistently rejected the *de facto* argument in area residency cases (see *e.g. United States* v. *Beltran*, 306 F. Supp. 995 (N.D. Cal.),) has at the same time held that such a defect does not invalidate purely ministerial acts of the local board. *United States* v. *Dominguez*, No. 42908, N.D. Cal., decided September 26, 1969. We are filing a copy of the *Dominguez* opinion herewith.

form from the clerk, he assumed from his conversation with her that she "would not receive the form back" and that pre-existing induction orders "superseded" any information which he might submit in connection with a conscientious objection claim (Pet. 42a, 53a-54a). Although the clerk was called by petitioner as a witness, she was never questioned as to what she said on the occasion when she furnished him with the special form (see 2 R. 140-187, 227-236; 3 R. 7-25).

The jury did not and was not required to accept petitioner's version of the events. See *Gonzales* v. *United States*, 364 U.S. 59, 66. Moreover, petitioner had admittedly discussed with retained counsel the matter of a conscientious objection claim in December 1967 (Pet. 48a-49a, 55a-57a) and, at the time, counsel wrote a letter to the board unequivocally stating that petitioner was willing to be inducted (see *supra*, p. 4). In these circumstances, it is difficult to believe that petitioner would have refrained from filing a conscientious objector claim because of the statement of the board clerk. As his attorney's letter makes plain the reason petitioner did not file the form was that he did not intend to assert such a claim.[11]

[11] Petitioner makes additional arguments, predicated in large measure upon *McKart* v. *United States*, 395 U.S. 185, to the effect that the court below refused to entertain his challenge to the composition of the local board because he had failed to exhaust his administrative remedies by appealing his I-A classification. (See Pet. 8-10, 12, 14-16). Petitioner misreads the opinion below. The basis of the decision was that petitioner's attack on the composition of the board did not en-

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
*Solicitor General.*

WILL WILSON,
*Assistant Attorney General.*

ROGER A. PAULEY,
EDWARD FENIG,
*Attorneys.*

OCTOBER 1970.

---

title him to an exemption (Pet. 6a). It was only in passing that the decision below pointed out, quite correctly, that this Court had held that McKart was entitled to an exemption (as the sole surviving son) as a matter of "statutory interpretation." 395 U.S. at 197-198. Accordingly, there is no reason to hold this case pending disposition in *McGee* v. *United States*, No. 362, this Term, certiorari granted, October 19, 1970, which, *inter alia*, raises exhaustion issues in a different context.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1970 407234 271

SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
E. ROBERT SEAVER, CLERK

# Supreme Court of the United States

October Term, 1970

No. 493

**WALTER JOSEPH COLLINS,**
*Petitioner,*

*—against—*

**UNITED STATES**

On Petition for a Writ of Certiorari to
the United States Court of Appeals for the Fifth Circuit

## REPLY TO BRIEF IN OPPOSITION

**ROBERT ALLEN SEDLER**
3461 Keithshire Way
Lexington, Kentucky 40503

**BENJAMIN E. SMITH**
**N. WILLIAM HODES**
**SMITH & SCHEUERMANN**
305 Baronne Street
New Orleans, Louisiana 70112

*Attorneys for Petitioner*

## TABLE OF CONTENTS


Page

Questions Presented . . . . . 1
Argument . . . . . 2
Conclusion . . . . . 13

## CITATIONS

Cases: Pages

Calhoon v. Harvey, 379 U.S. 134 (1964) . . . . . 4
Chaudron v. United States, 425 F.2d 605 (8th Cir., 1970), cert. denied, October 12, 1970 (No. 5426, this Term) . . . . . 6
Szepil v. Hershey, 425 F.2d 251 (7th Cir., 1970), cert. denied, October 12, 1970 No. 244, this Term) . . 6
DuVernay v. United States, 394 F.2d 979 (5th Cir., 1968), *aff'd.* by an equally divided Court, 394 U.S. 309 (1969) . . . . . 1,2,8
McKart v. United States, 395 U.S. 185 (1969) . . . . . 11
Oestereich v. Selective Service System Local Board, 393 U.S. 236 (1968) . . . . . 7
Powers v. Powers 400 F.2d 438 (5th Cir., 1968) . . 11
Strauder v. West Virginia, 100 U.S. 303 (1880) . . . . . 8
United States v. Cabbage, F.2d–, No. 19,775, 6th Cir., July 31, 1970, 3Sel.Serv.L. Rep. 3179 . . . . . 4,5
United States v. Clinton--F.Supp.--,Crim. No. 31, 857-C, E.D. La., April 24,1970 . . . . . 5
United States v. Machado, 306 F.Supp. 995 (N.D. Cal 1969) . . . . . 4
United States v. Stafford, 389 F.2d 215 (2d Cir., 1968). .3
United States v. Williams, 420 F.2d 288 (10th Cir., 1970) . . . . . 10
United States *ex rel.* Brown v. Resor, 429 F.2d 1340 (10th Cir., 1970) . . . . . 3,10
United States *ex rel.* Robinson v. Johnson, 316 U.S. 649 (1942) . . . . . 12
Western Pacific Railroad Case, 345 U.S. 247 (1953) . . . 12
Whitus v. Georgia, 385 U.S. 545 (1967) . . . . . 9

Regulations:

32 C.F.R.:

1604.52(c) . . . . . 4
1625.2 . . . . . 3

Other Authorities:

Brief for the Petitioner in DuVernay v. United States . . . . 8

# Supreme Court of the United States

October Term, 1970

No. 493

**WALTER JOSEPH COLLINS,**
*Petitioner,*

*–against–*

**UNITED STATES**

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## REPLY TO BRIEF IN OPPOSITION

## QUESTIONS PRESENTED

1. Whether this Court should grant certiorari to consider the effect of the non-residency of the members of a local board upon the board's power to classify and induct registrants, a question on which the lower courts are seriously divided.

2. Whether this Court should grant certiorari to resolve the question left unanswered by its affirmance of *DuVernay v. United States* by an equally divided Court, of whether the systematic exclusion of Negroes from membership on local boards violates the rights of Negro registrants?

3. Whether certiorari should be granted and the case remanded to the Court of Appeals for further proceedings on the issue of whether petitioner's rights were violated by his having been given misleading information by employees of his local board, as a result of which he failed to file a claim for classification as a conscientious objector?

## ARGUMENT

1. The government rejects the contention of the petitioner that the Court below refused to entertain his challenge to the composition of the local board because he had failed to exhaust his administrative remedies by appealing from his I-A classification. While this was the primary ground on which the trial court rejected the challenge (Pet 24a, 31a), and while the Court of Appeals relied on *DuVernay v. United States*, 394 F.2d 979 (5th Cir., 1968), *aff'd* by an equally divided Court, 394 U.S. 309 (1969), which *was* decided on exhaustion-waiver grounds, if the government is willing to concede that the exhaustion-waiver doctrine does not bar the challenge to the composition of the board, as apparently it is, that issue admittedly is no longer before the Court. The question then becomes whether this Court should grant certiorari to resolve the substantive issues, namely whether it is a defense to a prosecution for refusing to submit to induction that the local board which classified the registrant and which issued the order to report for induction was improperly constituted with respect to the residency of its members and/or because Negroes have been systematically excluded from membership.

The government argues that non-compliance with the provisions of the statute and regulations governing the

composition of local boards does not "deprive the orders of the board of legal effect, because like the acts of a legislature, they are acts of a de facto political authority." (Brief of the United States, p. 6). It further contends that the petitioner cannot challenge the composition of the board in any event because his acceptability for military service was "not dependent upon an act of judgement by the Board." (Brief of the United States, pp. 7-8). It is the contention of the petitioner that the composition of the board goes to the matter of its *jurisdiction,* and that a board improperly constituted with respect to the residence of its members lacks jurisdiction to issue *any* induction order and to classify the registrant at all. (Pet. 22). The analogy to "de facto political authority" misses the point, because an improperly constituted board, unlike a malapportioned legislature, for example, cannot perform the acts for which it was created because it lacks the *competency* to do so. It cannot classify registrants based on the personal knowledge of its members *that is deemed to follow from their residing in the county and in the area served by the local board.* It is not de facto, but totally illegal in its composition, and the analogy to a court lacking subject matter jurisdiction is much more in point. Because it was not constituted in accordance with the applicable statute and regulations, it had no power to classify the petitioner at all or to order him to report for induction. Certiorari should be granted to determine this question on which the government and the petitioner are fundamentally at odds--whether an improperly constituted board can exercise de facto authority, or whether its actions are absolutely void.

The petitioner would also dispute the position of the government that his acceptability for military service was not dependent upon an act of judgement on the part of the

board, as the uncontradicted testimony of the petitioner (Pet. 42a, 44a-45a) indicates, namely that no registrant would be permitted to file an application for conscientious objector status after he had received an order to report for induction. The fact that the judgement was made with respect to a class of registrants rather than with respect to the petitioner individually is immaterial, since the petitioner falls within the class. A differently-constituted board might have realized that it had the responsibility to consider post-induction claims for conscientious objector classification, and if so, it would have instructed the clerk to accept such claims rather than to tell registrants, as the petitioner was told, that it would do no good to file one. The classification process is a continuing one, and a registrant may be reclassified even after an order to report for induction has been issued. See 32 C.F.R. Section 1625.2; *United States v. Stafford* 389 F.2d 215 (2d Cir., 1968); *United States ex rel. Brown v. Resor,* 429 F.2d 1340 (10th Cir., 1970). The composition of the board could indeed have had an impact on the petitioner's classification.

Moreover, the difference between the petitioner's basic argument--that an improperly constituted board lacks jurisdiction to classify or induct at all--and that of the government--that there is no standing to attack improper composition unless it can be shown that a requested classification was denied by the board--furnishes all the more justification for granting certiorari so that the question of the power of an improperly-constituted board can be resolved by this Court once and for all.

And this points up the most significant omission in the government's brief in opposition. It does not deny the validity of the important certiorari consideration advanced

by the petitioner to the effect that, "The decisions of the federal courts passing on the question have gone off in many directions, making it all the more important that this Court definitively resolve it." *Calhoon v. Harvey,* 379 U.S. 134, 137 (1964). (Pet 20). Moreover, since the time of the filing of the petition the United States Court of Appeals for the Sixth Circuit has held that the provisions of 32 C.F.R. Section 1604.52(c) are mandatory. *United States v. Cabbage,* –F.2d–, No. 19,775, 6th Cir., July 31, 1970, 3 *Sel. Serv L. Rep.* 3179. In that case the conviction was reversed on other grounds, so it was not necessary for the Court to decide precisely whether improper composition constituted a defense to a criminal prosecution, as was held, for example, in *United States v. Machado,* 306 F.Supp. 995 (N.D.Cal. 1969). But the Court, after resolving the question of whether the requirement of area residence was mandatory, stated:

> "We find it intolerable, however, to send appellant back for reclassification by a board which the United States government has stipulated to be improperly constituted under the Selective Service regulation without any practical remedy for such violation. The principle of administration of the Selective Service system by potential draftees' 'friends and neighbors' is deeply buried in the history of the Selective Service Act. Allegations of violation of the regulation in the constitution of Selective Service Boards are frequent and usually tied to suggestions that such violations are racially motivated. . .
>
> "In view of its stipulation and the adjudication of the issues herein before set

> forth in this case, the government should (and we will assume will) move promptly to reconstitute the Selective Board concerned in accordance with the applicable regulation. In no event will applicant be subject to reclassification until this is done."3 *Sel.Serv.L.Rep.*

The need for definitive resolution of the question by this Court is heightened by the fact that another judge of the United States District Court for the Eastern District of Louisiana, the same Court in which the present petitioner was tried, has held that the requirement of area residency was mandatory and, therefore, invalidated an order to report for induction that had been issued by an improperly constituted board. *United States v. Clinton,* –F.Supp.–Crim. No. 31,857-C, E.D.La., April 24, 1970.

As the Sixth Circuit pointed out in *United States v. Cabbage,* supra, it is frequently contended that violations of the residency requirements are racially motivated. It is significant in the case at bar that the area served by the petitioner's local board is at least two-thirds Negro in population. At present there is one Negro on the board––prior to May, 1967, there were none. The failure to comply with the statute and regulation has meant in practical effect that whites who do not reside in the area classify Negroes who do. It is ironic that Clinton––a white classified and inducted by non-resident whites––is acquitted because of the improper composition of the board, while the present petitioner––a Negro classified and inducted by non-resident whites––faces a sentence of five years' imprisonment.

The present case is a particularly appropriate one for review on certiorari, because it involves both non-residency within the county, a statutory violation, and non-residency within the area, a violation of the Selective Service Regulations. Even the government is troubled by the non-residency of the chairman within the county, and is forced to back on the inapposite argument of de facto authority to sustain a violation of the *statute*. This important factor distinguishes the present case from *Chaudron v. United States* 425 F.2d 605 (8th Cir., 1970), cert. denied, October 12, 1970 (No. 5426, this Term), and *Czepil v. Hershey et al.* 425 F.2d 251 (7th Cir., 1970), cert. denied, October 12, 1970 (No. 244, this Term), both of which involved only area residency. Since the government concedes that the petitioner is not barred by the exhaustion-waiver doctrine from asserting improper composition, there are no collateral issues remaining, and the question is squarely presented.

It is important that this Court resolve the question once and for all. The government demands that young men comply with the Selective Service law and threatens them with imprisonment if they fail to do so. It is not "prejudiced" if a relatively few young men refuse to submit to induction, but it insists that all young men comply with the law and prosecutes the few who do not. But when the government itself is shown to be in violation of the law, it invokes concepts such as "de facto political authority" to excuse its violation. It demands that registrants specifically show that they were prejudiced by the government's failure to follow the law, arrogating to itself the right to violate the law if specific prejudice cannot be shown. There should be one law for the governors and the governed, binding both alike. A draft board not constituted in accordance with the

statute and regulations is a "lawless board" without the power to classify at all or to issue valid orders to report for induction. *C.F. Oestereich v. Selective Service System Local Board*, 393 U.S. 236, 237 (1968).

Certiorari should be granted to determine whether the government itself must comply with the law under which it has initiated criminal prosecutions, and to resolve this important question of federal law, on which the lower courts are divided.

2. The government argues that even assuming that Negroes have been systematically excluded from membership on local boards, this fact does not make the induction order invalid or give rise to a valid defense absent any showing that this resulted in any discrimination practiced by the board on petitioner. (Brief of the United States, p. 6). *It may be asked, "Why not?"* Why should Negroes be expected to serve in the Armed Forces when Negroes are not considered "worthy enough" to serve on local boards? Why is it that Negroes are expected to accept decisions concerning their very life that are made by whites, but whites are not expected to accept decisions concerning their lives that are made by Negroes—which presumably is the reason why Negroes are not allowed to serve on local boards, even in an area that is two-thirds Negro in population? May there perhaps not be some correlation between the absence of Negroes on local boards and the fact that Negro combat deaths in Vietnam are proportionately double those of whites?

These questions cannot be answered by the invocation of the "de facto political authority" doctrine or the demand, "Prove the board discriminated against you because you are a Negro." They relate to the very legitimacy of a system by which young Negro men are asked to give up their lives for

their country while members of their race are not considered "worthy enough" to participate in the selection process of men for the Armed Services. They call into issue the prejudice and racism that are a part of American society today. They demand resolution by this Court.

This matter was before the Court in *DuVernay v. United States,* 394 U.S. 309 (1969), and the Court was unable to resolve it at that time. That case, it is submitted, showed the fundamental unfairness of a system by which a board, whose chairman was a member of the Ku Klux Klan, had the power to classify and induct a young "black militant." (Brief for the Petitioner in *DuVernay v. United States,* pp. 42-43). The question will remain. It should be significant that since the time of *DuVernay, the situation has not basically changed and Negroes are still excluded (or only tokenly included), even on boards that serve areas predominantly Negro in population.* Petitioner's local board still does not have more than the "token Negro." Rather than argue that such exclusion is irrelevant, the government's position would have been better served if it had showed that Negroes now *do* serve on local boards in some proportion to their representation among the general population, particularly in areas that are predominantly Negro. This it cannot do.

The system will not be reformed unless and until this Court holds that when Negroes have been systematically excluded from membership on local boards, a Negro registered with such a board may not be convicted for failure to obey the board's order to report for induction. *C.F. Strauder v. West Virginia,* 100 U.S. 303 (1880). If this Court were to so hold, the system, it is submitted, would be reformed overnight and black faces would mingle with white ones on local boards just as they do in the foxholes, where

now black faces in proportion predominate. If the Court does not face up to the problem and does not take remedial action, the status quo may be expected to continue. This is what has happened so far.

Petitioner is not contending that a Negro must sit on every local board that may have occasion to classify a Negro registrant nor even that every local board must be racially proportioned. What he is contending is that before a Negro registrant is convicted and sentenced to five years' inprisonment, he should have the opportunity to show that Negroes have been systematically excluded from membership on his board where, in view of the racial composition of the area served by that board, it would be expected that in the absence of systematic exclusion, Negroes would have been appointed. Where the area served by the board is two-thirds Negro in population, as is the case with petitioner's board, and there is only a "token Negro" out of six members--and that not until May, 1967--systematic exclusion has been established. *C.f. Whitus v. Georgia*, 385 U.S 545 (1967).

The court should grant certiorari to resolve this fundamental question.

3. The government apparently does not dispute the proposition that if the petitioner were dissuaded from filing a conscientious objector claim by misleading statements of board officials, this would render the order to report for induction invalid. It also apparently agrees with the contention of the petitioner that failure to appeal from a prior I-A classification does not bar assertion of this defense. Its position is that "he made no such claim and he did not establish that he was in fact misled." (Brief for the United States, p. 9).

However, the uncontradicted testimony of the petitioner showed that he was advised by the clerk of the local board and by another official that it would do him no good to file an application for conscientious objector status after he had received an order to report for induction, because the board would not consider it. (Pet 42a, 44a-45a). He then testified that he did not file the Form 150, because he believed that it would be futile to do so. (Pet 48a). These facts, if true, constitute erroneous advice in violation of a registrant's right to fair treatment from his board. See *e.g., United States v. Williams,* 429 F.2d 1340 (10th Cir., 1970).

The government made no attempt to contradict this testimony, and for this reason the petitioner's failure to question the clerk on this point is fully explicable. If the government had intended to challenge the petitioner's version of what happened, it might be expected that it would have done so in the trial court. This it did not do. There is nothing to indicate that the trial judge, who resolved the question against the petitioner in ruling on the motion to dismiss, disbelieved the petitioner, since he held that the issue could not be raised on grounds of exhaustion-waiver. (Pet. 31a-33a). The trial judge also emphasized that the petitioner did not appear before the *board* and, in light of his ruling on exhaustion-waiver, made no finding as to the actions of the clerk or other employees. Although he petitioner testified to these matters at trial, the question was *not* before the jury. The jury was not instructed that it could acquit the petitioner if it found that misleading advice had been given, which is understandable, since the Court had previously ruled that the petitioner was foreclosed by principles of exhaustion-waiver from raising the issue.

The cryptic opinion of the Court of Appeals, which in

view of the reliance on *DuVernay* and the distinguishing of *McKart v. United States*, 395 U.S. 185 (1969), could be explained on exhaustion-waiver grounds, did not deal with this issue specifically. Petitioner has contended that it implicitly affirmed the action of the District Judge in rejecting the claim on exhaustion-waiver grounds. But if it did so, its decision in that regard would be inconsistent with its own decision in *Powers v. Powers*, 400 F.2d 438 (5th Cir., 1968), and the decisions of other Courts of Appeal which have passed on the question. On the other hand, if petitioner were not barred from asserting the defense on exhaustion-waiver grounds, and since the matter had been determined below by the Court rather than the jury, it is inexplicable why the Court of Appeals did not reach the merits of the contention, which had been briefed and argued before it.

In other words, the Court of Appeals either rejected the contention on exhaustion-waiver grounds——which the government would concede to have been improper——or it did not pass on it at all. The uncontradicted evidence of the petitioner did establish that he was misled by the employees of the board, and he was entitled to have the validity of that contention judicially determined. The refusal of the Court of Appeals to deal properly with this crucial defense represents a departure so far from the accepted course of judicial prodeedings as to call for an exercise of this Court's power of supervision.

On this issue the judgement of the Court of Appeals affirming the petitioner's conviction should be vacated and the case remanded to that Court with directions to rule on the contention of the petitioner that his rights were violated when he was dissuaded from filing a claim for conscientious objection because of misleading advice given to him by

employees of the board *C.f. United States ex rel. Robinson v. Johnson*, 316 U.S. 649 (1942); *Western Pacific Railroad Case*, 345 U.S: 247 (1953).

## CONCLUSION

For the reasons aforesaid, and for the reasons set forth in the Petition for Certiorari, it is respectfully prayed that the writ be granted.

Respectively Submitted

ROBERT ALLEN SEDLER
3461 Keithshire Way
Lexington, Kentuky 40503

BENJAMIN E. SMITH
N. WILLIAM HODES
SMITH & SCHEUERMANN
305 Barrone Street
New Orleans, Louisiana 70112

Attorneys for Petitioner

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
DEC 8 1970
E. ROBERT SEAVER, CLERK

# Supreme Court of the United States

October Term, 1970

No. 493

**WALTER JOSEPH COLLINS,**
*Petitioner,*

*—against—*

**UNITED STATES**

On Petition for a Writ of Certiorari to
the United States Court of Appeals for the Fifth Circuit

## PETITION FOR REHEARING

**ROBERT ALLEN SEDLER**
3461 Keithshire Way
Lexington, Kentucky 40503

**BENJAMIN E. SMITH**
**N. WILLIAM HODES**
**SMITH & SCHEUERMANN**
305 Baronne Street
New Orleans, Louisiana 70112

*Attorneys for Petitioner*

# Supreme Court of the United States

October Term, 1970

No. 493

**WALTER JOSEPH COLLINS,**
*Petitioner,*

*—against—*

**UNITED STATES**

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## PETITION FOR REHEARING

The petitioner herein respectfully moves this Court for an order vacating its denial of the petition for a writ of certiorari, entered on November 16, 1970, and granting the petition. As grounds for this motion, petitioner states the following:

1. *The Amendment of the Selective Service Regulations Removing the Requirement of Area Residency Makes It All the More Important That This Court Determine the Effect of Non-Residency Within the County and Exclusion of Negroes from Broad Membership Upon the Power of the Board.*

It is not disputed that the chairman of petitioner's local board at all times pertinent was not a resident of the county in which the local board had jurisdiction. (Pet. 67a-69a). Even the government has conceded that this violation of the requirements of 50 App. U.S.C. section 460(b)(3), posed a "more troublesome problem" than the violation of the requirements of 32 C.F.R. section 1604.52(c) relating to residency within the geographical area of the board's jurisdiction. On September 2, 1970, section 1604.52(c) was changed by Executive Order No. 11,555 to eliminate the requirement of area residency. That regulation now provides simply that:

> "The members of the local board shall be citizens, male or female, of the United States who shall be residents of a county in which their local board has jurisdiction. . ."

The government has, in other cases, apparently conceded that the statutory requirement is mandatory in nature. *United States v. Machado*, 306 F. Supp. 995, 997 (N.D.Cal. 1969). The Courts of Appeal for the Seventh and Eighth Circuits have indicated the same view, *Czepil v. Hershey*, 425 F.2d 251 (7th Cir., 1970), cert. denied, October 12, 1970 (No. 244, this Term), *Chaudron v. United States*, 425 F.2d 605 (8th Cir., 1970), cert. denied, October 12, 1970 (No. 5426, this Term), and the Sixth Circuit has held that all residence requirements are mandatory. *United States v. Cabbage*, 430 F2d 1037 (6th Cir., 1970). The repeal of the requirement of area residency makes it all the more important that this Court resolve the effect of violation of the mandatory statutory requirement of county residency.

It is the submission of the petitioner that a board

constituted in violation of the statute is a "lawless board" without the power to classify registrants or to issue valid orders to report for induction. *C.F. Oestereich v. Selective Service System Local Board,* 393 U.S. 236, 237 (1968). Where the government itself has failed to comply with the mandatory provisions of the federal law under which it has initiated criminal prosecutions, it should not be able to demand that young men comply with the same law, nor should it be able to invoke the aid of the courts in sentencing those young men to five years' imprisonment. Moreover, as a practical matter, to invalidate orders of induction issued by a board not constituted in accordance with the statute will not interfere with the operation of the Selective Service System in the same way as would the invalidation of orders due to non-compliance with the former requirement of area residency. There simply will not be as many instances of violation. But where such a violation does occur, the board is "infected with an alien presence" and is not the kind of board the President was directed to establish by section 460(b)(3). By no stretch of the imagination could it even qualify as a "de facto board." To condone such a violation by the Selective Service System of the law it is called upon to administer by Congress is shocking, and elementary principles of justice and fair play demand that the orders issued by an illegally-constituted board be refused enforcement in the courts.

Secondly, removal of the requirement of area residency may eliminate the only possible hope that boards serving areas predominantly Negro in population will contain Negroes in some proportion to their representation among the population of the area served. Admittedly the requirement of area residency has not proved particularly

successful in having Negroes placed on boards serving Negro areas. But with the elimination of that requirement, it becomes even easier to justify the exclusion of Negroes, since "coincidentally" the residents of the county chosen to serve on the boards will be white. The Court *must* face up to this question, particularly since it has now become easier to "legally justify" the exclusion of Negroes. It is submitted that there is something fundamentally wrong with a system by which Negroes are expected to give up their lives in military service while members of their race are excluded from membership on draft boards who make the selection of who shall serve—and who may die.

The removal of the requirement of area residency has made it all the more important that this Court pass on the other issues relating to board membership that are raised in the petition for certiorari, namely residency within the county as required by statute and the exclusion of Negroes from boards that serve areas predominantly Negro in population. For these reasons the denial of certiorari should be reconsidered so that these fundamental questions can be heard and resolved.

2. *The Contention That the Petitioner Was Dissuaded from Filing a Post-Induction Claim for Conscientious Objector Status Raises Important Questions Related to the Substantive Question Presented in Ehlert v. United States.*

In *Ehlert v. United States*, (422 F.2d 332 (9th Cir., 1970) (No. 120, this Term), this Court will presumably decide whether a local board is required to consider on the merits a claim for classification as a conscientious objector that has been made for the first time after an order to report for induction has been issued. If it decides that local boards must

hear such claims whenever a prima facie case for the classification has been established, it would be intolerable to allow a conviction to stand where a local board has had a policy against considering such claims and where pursuant to such policy, a registrant was advised that it would do him no good to file one.

The government has argued that the present petitioner "made no such claim and did not establish that he was in fact misled." (Brief for the United States, p. 9). The petitioner's reply to the brief in opposition, elaborating on his argument in this regard, may have reached the Court too late for consideration prior to its denial of certiorari. It is obvious that the main thrust of this case has been the improper composition of the local board, and on that basis certiorari may have been denied following the denial of certiorari in *Czepil v. Hershey* and *Chaudron v. United States*. However, the issue of misleading advice with respect to post-induction claims of conscientious objection should not be ignored and takes on greater significance in view of the grant of certiorari in *Ehlert*.

The government's contention that the petitioner did not establish that he was in fact misled is simply not borne out by the record. The uncontradicted testimony of the petitioner showed that he was advised by the clerk of the local board and by another official that it would do him no good to file the application for conscientious objector status because the board would not consider such claims after an order for induction had been issued. (Pet. 42a, 44a-45a). The government made no attempt to contradict this testimony in the District Court by calling the clerk of the board. There is nothing to indicate that the trial judge, who resolved the question against the petitioner in ruling on his motion to

dismiss, disbelieved the petitioner, since he held that the issue could not be raised on grounds of exhaustion-waiver. (Pet. 31a-33a). Although the petitioner testified as to these matters at trial, the issue was not before the jury, since the Court had previously ruled that the petitioner was foreclosed by principles of exhaustion-waiver from raising the issue. The Court of Appeals did not specifically discuss this issue in its opinion, and either rejected the contention on exhaustion-waiver grounds—which the government would concede to have been improper— or did not pass on it at all.

If this Court holds in *Ehlert* that boards must consider post-induction claims for classification as a conscientious objector, the policy of petitioner's local board in refusing to consider such claims would be manifestly improper. If, as petitioner contends, because of that policy he was advised that it would do him no good to file such a claim, and therefore, did not do so, his right to fair treatment from his board was clearly violated. See *e.g., United States v. Williams,* 429 F.2d 1340 (10th Cir., 1970).

The petitioner has asked that on this issue the judgment of the Court of Appeals affirming his conviction should be vacated, and the case remanded to that Court with directions to rule on his contention that he was dissuaded from filing a post-induction claim for conscientious objector status because of misleading advice given to him by employees of his local board. He has alleged that this advice was given because of a *policy* of the board precluding the consideration of such claims. If this Court holds in *Ehlert* that such claims must be considered, that policy would clearly be illegal and the advice given to petitioner on the basis of that policy necessarily misleading.

The uncontradicted testimony in the record shows that the petitioner was advised of such a policy and that because of such advice he was dissuaded from filing his post-induction claim. In the event that this Court holds in *Ehlert* that local boards must consider post-induction claims for conscientious objector status, petitioner's case should be remanded to the Court of Appeals with directions that it review his contention that his board had a policy of refusing to consider such claims and that he was so advised, as a result of which he failed to file his claim.

*Conclusion*

For the reasons set forth above, as well as those contained in the petition for certiorari, petitioner prays that this Court grant rehearing of the order of denial, vacate that order and grant the petition.

Respectively Submitted

ROBERT ALLEN SEDLER
3461 Keithshire Way
Lexington, Kentuky 40503

BENJAMIN E. SMITH
N. WILLIAM HODES
SMITH & SCHEUERMANN
305 Barrone Street
New Orleans, Louisiana 70112

Attorneys for Petitioner

*Certificate of Counsel*

As counsel for the petitioner who has prepared this petition for rehearing, I hereby certify that this petition is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

ROBERT ALLEN SEDLER